Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

MARK ABDU-BRISSON, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC. AND
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in concluding that plaintiffs in an age discrimination case survive a motion for summary judgment only if they are able to prove that the employer's asserted nondiscriminatory reasons for its employment actions were "false."

2. Whether the Second Circuit erred in granting summary judgment against age discrimination plaintiffs on the ground that they could not prove "falsity," when they proffered evidence from which the jury could find that adverse employment actions were motivated by plaintiffs' age.

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Petitioners,

—against—

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION, DELTA AIR LINES, INC.,

Respondents.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 239 F.3d 456 (2d Cir. 2001), and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 17a. The opinion of the District Court for the Southern District of New York is reported at No. 94 CIV. 8494, 1999 WL 944505 (S.D.N.Y. Oct 19, 1999) and is reprinted at Pet. App. 56a.

Other opinions below are: *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F.Supp. 109 (S.D.N.Y. 1996), reprinted at Pet. App. 38a; *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2nd Cir. 1997) reprinted at Pet. App. 1a; and *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494, 1999 WL 64436 (S.D.N.Y. Feb 09, 1999), reprinted at Pet. App. 45a.

JURISDICTION

The U.S. Court of Appeals for the Second Circuit entered judgment on February 12, 2001. *See* Pet. App. 17a. The U.S. Court of Appeals for the Second Circuit denied rehearing on May 14, 2001. *See* Pet. App. 55a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides in relevant part that it shall be an unlawful employment practice for an employer to:

> "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in relevant part that it shall be an unlawful employment practice for an employer:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 296.1 of the New York Executive Law, the New York State Human Rights Law ("State HRL"), provides in relevant part that:

> "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age . . . of any individual, to refuse to hire or to bar such an individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

New York City Admin. Code §§ 8-107 *et seq.*, the New York City Human Rights Law ("City HRL"), provides in relevant part:

> "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or discriminate against such person in compensation or in terms, conditions or privileges of employment."

Fed. R. Civ. P. 56(c) provides in relevant part that:

> "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

Factual History

Plaintiffs are airline pilots employed by Delta Air Lines, Inc. ("Delta"). Plaintiffs all worked previously for Pan American World Airways, Inc. ("Pan Am") and were hired by Delta in 1991 when Delta acquired two business operations formerly run by Pan Am.

On January 8, 1991, Pam Am filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. During the administration of Pan Am's bankruptcy case, Delta won a bidding war among other airlines to acquire two coveted operations run by Pan Am, that is, the Pan Am Shuttle, Inc. (a separate corporation operating between New York, Boston and Washington) and Pan Am's Atlantic Division (a division of the airline running its Transatlantic Routes). Both operations continued to function during Pan Am's bankruptcy, and Delta ultimately acquired them in turnkey fashion as ongoing businesses, complete with aircraft, gates and landing slots, maintenance equipment, airport facilities, ground personnel, and most important, flight crews.

As Delta management knew, the former Pan Am pilots hired by Delta were, as a class, considerably older and more experienced than Delta's own pilots. Delta needed the plaintiffs' in order to operate the aircraft and fly routes acquired from Pan Am. Delta did not have a sufficient number of qualified pilots with the requisite certifications to be able to redeploy its own pilots to handle those routes and could not have hired and trained hundreds of new pilots without a massive disruption of those operations.

Upon acquiring the Pan Am Shuttle and Transatlantic Routes, Delta hired the needed Pan Am pilots manning those routes and subjected them to terms and conditions of employment inferior to those afforded Delta pilots of similar age and experience. First, Delta management devised a seniority integration methodology which they then used to integrate plaintiffs into slots on Delta's seniority list well beneath significantly younger and less experienced pilots from Delta's incumbent pilot group with correspondingly lower compensation. Second, plaintiffs were hired at lower pay rates and were required to endure a three-year step-up to full pay parity with incumbent Delta pilots. Third, days prior to the beginning of the transfer of the older-aged Pan Am pilots, Delta adopted a ten-year service requirement for full post-retirement medical benefits. All incumbent Delta pilots, including those over the age of 50, were exempted from the requirement. Plaintiffs aged 50 or older were not exempted from the requirement.

The effect of these three actions on plaintiffs was devastating. Many of them were in their fifties when defendant hired them, less than ten years away from mandatory age-60 Federal regulatory retirement rules for pilots flying as captains and first officers. They found themselves at seniority levels so low they were flying junior to less experienced pilots 20-years younger and with no way to recover from the three-year pay discrepancy before being forced to retire. Nor could most ever satisfy the newly implemented ten-year service requirement for post-retirement medical benefits.

Plaintiffs filed suit against their employer alleging age discrimination by Delta in the following: (1) the manner by which Delta integrated them into the seniority list; (2) a three-year period of pay disparity between the plaintiffs and other Delta pilots with the same experience; and (3) the imposition on them of a ten-year service requirement before they could receive post-retirement medical benefits. Through discovery,

plaintiffs obtained documents that provided direct evidence of the discriminatory animus motivating Delta management. Plaintiffs discovered that Delta's files were littered with documents containing derogatory references to plaintiffs' "older ages." Further, these documents were written by those in Delta's management charged with the responsibility for developing the terms and conditions of plaintiffs' employment. By way of example, Delta's Vice President of Flight Operations, and principal management person in charge of plaintiffs' hiring, wrote in a memo entitled "FACT FINDING/OPINION" that Pan Am personnel represented a "contaminated workforce, especially since 1987. Not meet Delta standards—68 over age 60, four over age 70, 26 two-step bid down, 50% retire 2001 not 1995."[1] Overall, the numerous documents discovered by plaintiffs repeated a consistent theme, *i.e.*, that Delta's management viewed the plaintiffs and their hiring, though necessary for its turnkey aspirations, as a negative, and, in the context of discussing plaintiffs' ages, described plaintiffs as "burdened," "aged," "contaminated," "bad apples," and "very senior."[2]

Procedural History

Plaintiff pilots filed a claim of age discrimination against their employer, Delta Airlines. The plaintiffs' action was originally brought in state court[3] but was removed by defendants to federal District Court on the grounds that the complaint "arose under" the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, *et seq.*, because plaintiffs were seeking to modify a medical benefits plan.

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[1] *See Abdu-Brisson v. Delta*, 239 F.3d 456, 462 (2d Cir. 2001).

[2] *See Id.*

[3] Alleging violations of the New York State and City Human Rights Laws. (N.Y. State Exec. Law § 296 and N.Y.C. Admin. Code §§ 8-107(1)(a), (c)—107(17)).

In 1996, at the close of discovery, Delta moved to dismiss under Fed. R. Civ. P. 12, or alternatively, for summary judgment under Fed. R. Civ. P. 56.[4] On May 20, 1996, the district court granted Delta's motion to dismiss on the ground that the ADA preempted plaintiffs' claims. *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996). In late 1997, the Second Circuit court reversed the decision of the district court, ruling that the ADA did not preempt plaintiffs' claims. *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2d Cir. 1997). Upon return of the case to the district court, Delta renewed its motion to dismiss on the ground that plaintiffs' claims were preempted by the Railway Labor Act, 45 U.S.C. 151, *et seq.* ("RLA"), and on its earlier asserted but unresolved arguments and its never-decided motion for summary judgment.[5]

On January 6, 1999, the district court denied Delta's motion to dismiss.[6] On October 19, 1999, the district court granted the motion for summary judgment and dismissed plaintiffs' age discrimination suit, ruling that the plaintiffs were not similarly situated to Delta's incumbent pilots and

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[4] In its motion to dismiss, Delta argued that: (1) The State and City HRLs did not apply to plaintiffs' claim; (2) plaintiffs' claims were preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. 41713; (3) plaintiffs' challenge to the ten-year service requirement in the post-retirement medical benefits plan was preempted by ERISA; and (4) plaintiffs' claims were barred by a bankruptcy court order of August 12, 1991.

[5] Delta also joined the Air Line Pilots Association International, Inc., the pilots' union, as a co-defendant pursuant to Fed. R. Civ. P. 19, on the ground that its presence was necessary for complete relief between the parties. On its second motion to dismiss the district court denied Delta's assertion that plaintiffs' claims were preempted by the RLA.

[6] *See Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494, 1999 WL 4959 (S.D.N.Y. Jan. 6, 1999), *superceded by Abdu-Brisson v. Delta Air Lines, Inc.* No. 94 CIV. 8494, 1999 WL 64436, *2 (S.D.N.Y. Feb 09, 1999).

thus could not establish a *prima facie* case. *See Abdu-Brisson v. Delta Air Lines, Inc.*, No. 98 Civ. 8494 (HB), 1999 WL 944505, *3-4 (S.D.N.Y. Oct. 19, 1999).

The United States Court of Appeals for the Second Circuit affirmed. In part, the Second Circuit disagreed with the district court, ruling that plaintiffs had presented a *prima facie* case of age discrimination, finding that the significant documentary evidence that age was a factor in Delta's decisions to implement the seniority integration system methodology it created and to subject plaintiffs to lower pay and benefits than Delta employees doing the same work, "inescapably lead to the conclusion that Delta's actions may indeed have been motivated by age-based animus." *Abdu-Brisson v. Delta*, 239 F.3d 456, 468 (2d Cir. 2001).[7] Nevertheless, the Second Circuit ruled that Delta had met its burden of producing evidence that the challenged employment actions was based on its proffered nondiscriminatory reason. Ultimately, the Court affirmed the grant of summary judgment against the plaintiffs because it found that they had presented no evidence to prove that Delta's proffered reasons were "false." *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 470 (2d Cir. 2001).

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[7] The district court had concluded that plaintiffs could not establish a *prima facie* case because they were not similarly situated to pilots who had been at Delta before plaintiffs were hired. *See Abdu-Brisson, v. Delta Air Lines, Inc.*, No. 98 Civ. 8494 (HB), 1999 WL 944505, *3-4 (S.D.N.Y. Oct. 19, 1999). The Second Circuit disagreed with that conclusion, determining that the plaintiffs' had direct evidence of discriminatory intent and therefore did not have to demonstrate that they were "similarly situated" to previous Delta pilots. *Abdu-Brisson*, 239 F.3d at 466.

REASONS FOR GRANTING THE WRIT

I. THERE IS CONFUSION AMONG THE CIRCUITS AS TO WHETHER A PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION CASE MUST PROVE THAT THE EMPLOYER'S ASSERTED NON-DISCRIMINATORY REASON WAS "FALSE."

The Second Circuit held in this case that plaintiffs could not survive a motion for summary judgment because they produced no evidence to prove that the nondiscriminatory reasons offered by the defendant for adverse employment actions were "false." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461, 470 (2d Cir. 2001). The decision of the Second Circuit is contrary to the guidance of this Court in a line of decisions addressing discrimination claims.[8] The Second Circuit's decision also illustrates confusion among the circuits over whether a plaintiff must prove that the employer's proffered nondiscriminatory reason for adverse employment action was "false" and, more generally, over the meaning of "pretext" in this Court's discrimination decisions.

The ultimate issue in a discrimination suit is "whether plaintiff has proved 'that the defendant intentionally discriminated against [him]' because of his [membership in a protected class]." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511(1993)(*quoting Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A plaintiff need not demonstrate that discrimination was the sole reason for the adverse action. The plaintiff's age must have "'played a role

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[8] Age discrimination claims brought under the State HRL and the City HRL are analyzed under the same burden shifting framework as claims brought under the federal Age Discrimination Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e *et seq.* *Abdu-Brisson*, 239 F.3d at 466 (2d Cir. 2001). Thus, the Second Circuit decided this case under federal law.

in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 141 (2000)(*quoting Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

This Court has established a framework under which the burden initially rests on the plaintiff to produce evidence sufficient to establish a *prima facie* case of discrimination. That burden may and often is met without any direct evidence of discriminatory intent. The plaintiff may show only that he or she ("he") is a member of the protected class, that he is qualified for the position, that he suffered adverse employment action and that the circumstances surrounding the action give rise to an inference of discrimination.[9] Once the plaintiff meets that burden, a presumption of discrimination exists, unless the defendant produces evidence that the employment action was taken for a non-discriminatory reason. *St. Mary's*, 509 U.S. at 507 (*citing Burdine*, 450 U.S. at 254). If the defendant meets this burden of production, the presumption disappears. *Id.* The plaintiff then must prove that the employer's proffered reason is a "pretext" for discrimination. *Id.* at 516 (*citing Burdine* 450 U.S. at 258).

The issue in this case concerns what a plaintiff must demonstrate to meet the ultimate burden of proving discrimination, after the employer has produced evidence of a nondiscriminatory reason. This Court recently has addressed issues closely related to this. *See Reeves*, 530 U.S. 133; *St. Mary's*, 509 U.S. 502. This Court has not addressed the issues presented here—whether a plaintiff must prove that the employer's proffered reason was "false" and, if not, what a

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[9] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)(setting out the minimal requirements of a *prima facie* case); *Burdine*, 450 U.S. 248, 253 n.6 (1981) (*McDonnell Douglas* framework is flexible and can be adapted to fit the facts of each case).

plaintiff must prove to demonstrate that the employer's proffered reason was "pretext."

Courts have long wrestled with the question of whether the class of explanations that may be deemed "false" are precisely coextensive with the class of explanations that may be deemed "pretextual." *See, e.g., Golomb v. The Prudential Insurance Company of America*, 688 F.2d 547 (7th Cir. 1982). Proof that an explanation is "pretextual" meets a plaintiff's burden. Not all "pretextual" explanations, however, are "false." The Seventh Circuit in *Golomb* took care to distinguish between the two and to conclude that pretextuality is not synonymous with falsity. A plaintiff who cannot demonstrate the surface "falsity" of an explanation nonetheless may meet his burden of showing intentional discrimination if he shows that the proffered reasons are a "pretext" for discrimination.

As the court in *Golomb* recognized, a proffered explanation that the employer was concerned about costs may be, as a general proposition, true (or at least nearly impossible to prove false) and still not be the real or the only explanation for adverse employment actions affecting the plaintiffs. Requiring a plaintiff to demonstrate that a defendant's proffered explanation was "false" sets too high a bar and shifts the focus away from the ultimate issue of discriminatory intent. It also runs counter to this Court's guidance in *Burdine*, which established the disjunctive that the plaintiff may succeed in persuading the factfinder that he has been the victim of intentional discrimination "either directly by persuading the [factfinder] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Finally, it ignores the Court's directive in *Hazen Paper* that the discriminatory motivation need not have been the sole cause of the employment action; it must be shown to have had a

"determinative influence in the outcome." 507 U.S. at 611. Only "when the employer's decision *is* wholly motivated by factors other than age, [does] the problem of [age discrimination] disappear[]." *Id.* (emphasis in original). *See also Golomb*, 688 F.2d at 552 ("[I]n describing the plaintiff's burden of proof, [the district court] correctly instructed that Golomb had to prove that 'age was *a* determining factor' . . . .")(emphasis in original); *Miller v. Cigna Corp.*, 47 F.3d 586, 594 n.6 (3d Cir. 1995)(granting of a new trial on basis that plaintiff need not prove that age was the "sole cause" of the employment action); *Id.* at 593-594 (*citing* 110 *Cong. Rec.* 2728, 13837 (1964))(congressional rejection of an amendment that would have placed the word "solely" in front of the words "because of").

The issue presented here is of considerable significance in a discrimination case such as this. The plaintiffs presented clear evidence of discriminatory intent, in the form of severe disparities in treatment between plaintiffs and their younger counterparts and of internal memoranda describing the plaintiffs in derogatory terms because of their age. The reasons offered by the defendant for the adverse employment actions were broad and general—(1) a reasonable accommodation of competing interests; and (2) costs.

It would be very difficult for any plaintiff to prove that the reasons stated by the defendant in this case were "false," and, under this Court's precedents, plaintiffs should not have been required to do so. The plaintiffs' evidence was sufficient for the jury to conclude that, whether or not the defendant was concerned about costs, a reason it used its unhealthy concern about plaintiffs' older ages was a formative factor in its decisions relating to the establishment of plaintiffs' employment terms and conditions. Thus, age clearly was "a determinative influence" in the adverse employment action. Similarly, whether or not the seniority integration system seemed "reasonable," it also was the result

of an intent on the defendant's part to discriminate against the plaintiffs because of their age. Whether or not defendant's proffered reasons for its actions may have been "true" as propositions of fact, they were pretextual nonetheless.

This Court should clarify whether a discrimination plaintiff must prove that the nondiscriminatory reason offered as a proposition of fact by a defendant is "false." The Second Circuit's decision here, requiring that plaintiff prove falsity, to survive a motion for summary judgement, stands in direct contrast to the Seventh Circuit's decision in *Golomb*, recognizing that "pretext" must not be equated with falsity 688 F.2d at 552; *see also EEOC v. Louisiana Office of Community Service*, 47 F.3d 1438 (5th Cir. 1995)(equating "pretext" with "falsity").

In *St. Mary's* and *Reeves*, this Court did not address the question addressed in *Golomb* and presented by this case. In *St. Mary's*, the Court held that a discrimination plaintiff who proves that the reasons proffered by the defendant were not credible does not necessarily meet the ultimate burden of persuading the factfinder that the defendant intentionally discriminated against him. Both the majority and dissent in this case assumed that the plaintiff had demonstrated that the employer's proffered explanation was "false." The issue, stated repeatedly by the majority, was whether the plaintiff must prove "*both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's*, 509 U.S. at 515, 507-508 (emphasis in original); [10] *see also id.* at 534-535 (Souter, J., dissenting) (majority places plaintiff at tremendous disadvantage in having to confront "not the

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[10] The language in *St. Mary's*, that an employer's "reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false, *and* the discrimination was the real reason," has been quoted by numerous courts. *See Walton v. Bisco Indus.*, 119 F.3d 368, 370 (5th Cir. 1997); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999).

defined task of proving the employer's stated reasons to be *false*, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record")(emphasis added).

Taken out of context, the language of *St. Mary's* suggests that a showing of falsity is a necessary element of a successful plaintiff's discrimination case. The Court, however, was addressing the facts of that case. The Court's analysis does not support a requirement that a plaintiff prove "falsity." The Court quotes *Burdine's* recognition that proof that an employer's proffered explanation is not worthy of credence is but one way in which a plaintiff may meet his burden of proving discrimination. *St. Mary's* 509 U.S. at 519. In addition, the Court explains that "pretext" is the ultimate issue, not an intermediate showing required of the plaintiff. It is simply another way of stating the requirement that "whatever the stated reasons for [the plaintiff's] rejection, the decision was in reality racially premised." *St. Mary's*, 509 U.S. at 517-18 (*quoting McDonnell Douglas*, 411 U.S. at 805 n.18). "Pretext," in other words, is not the same as "falsity." A plaintiff must demonstrate "pretext." He is not required to demonstrate falsity if he can make a showing of pretextuality.

Similarly, in *Reeves*, the Court described the plaintiff's "substantial showing that the [employer's] explanation was false," and addressed what *additional* evidence was required to support a verdict in the plaintiff's favor. 530 U.S. at 144. The Court noted the probative force of showing that an employer's explanation was unworthy of credence and concluded that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

The Court in *Reeves* did not hold that a plaintiff may prevail only if he demonstrates that the proffered reason was "false." In fact, the Court acknowledged that "[p]roof that the

defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." *Id.* at 147. It also noted the probative force of the evidence of discriminatory comments made by the decisionmaker behind the plaintiff's firing. *Id.* at 152.

This Court should clarify what showing a plaintiff must make when the defendant has proffered evidence of a non-discriminatory reason for the action. This Court has addressed this issue only in the context of cases in which the plaintiff has presented evidence that the proffered reason was, as a proposition of fact, false. It has not addressed the issue in the context presented here, where the plaintiffs presented substantial evidence of discriminatory intent, sufficient to support a finding that the proffered reasons were a "pretext" for discrimination but not sufficient to establish that defendant's proffered reasons were "false" as a proposition of fact.

II. GUIDANCE IS NEEDED ON THE STANDARD FOR DETERMINING A SUMMARY JUDGMENT MOTION WHEN THE PLAINTIFF DOES NOT PROVE THE EMPLOYER'S PROFFERED REASON "FALSE."

Plaintiffs in this case presented clear evidence that the adverse employment actions were motivated by Delta's intent to discriminate against them because of their age. Included in that evidence were derogatory comments made by Delta management about plaintiffs' ages. The Second Circuit's decision, affirming summary judgment despite that evidence, is in direct contrast to decisions of other circuits recognizing that "the decision as to an employer's true motivation is one reserved to the trier of fact." *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1986)(as amended)("When a plaintiff doesn't rely exclusively on the [*McDonnell Douglas*]

presumption but seeks to establish *prima facie* case through the submission of evidence, very little such evidence is necessary to raise a genuine issue of fact regarding employer's motive.")(quoting *Peacock v. DuVal*, 694 F.2d 644, 645 (9th Cir. 1982))(citations omitted); *see also Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974)(reversing summary judgment for defendant; proper interpretation of Delta's comments should be decided by the trier of fact); *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991)(reversing summary judgment; whether facts indicate discrimination should be resolved by a factfinder).

The evidence proffered in this case created a factual dispute over whether Delta's proffered reasons for its actions were the "real" and "only" reasons, or whether age discrimination "had a determinative influence on the outcome." *See Reeves* 430 U.S. at 611. Instead of recognizing that the plaintiffs were entitled to have the jury decide the question of "intent," based on an examination of all of the evidence—the Second Circuit's "falsity" requirement artificially altered the focus of this case. The court's focus should have been on intent. With that focus, summary judgement clearly would be inappropriate, because "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150 (*citing Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986)). In this case, the Second Circuit asked only whether there was evidence of "falsity." Finding none, it granted summary judgment against the plaintiffs.

This Court's guidance is needed to make clear that a plaintiff who presents legitimate evidence of discriminatory intent is entitled to have the jury decide his case. Absence of proof of "falsity" of the employer's proffered non-discriminatory reasons should not neutralize the plaintiffs' evidence of discriminatory intent and nullify their right to a

jury trial. The employer's proffered explanation should be decisive at the summary judgment stage only if, in light of that explanation, no reasonable juror could decide that the adverse employment actions were motivated by a discriminatory intent. Had that test been applied in this case, summary judgment could not have been granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

No. 1144, Docket 96-7721

MARK ABDU-BRISSON; *et al.*
Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.,
Defendant-Appellee.

Argued March 6, 1997
Decided Oct. 15, 1997

Before: WALKER, McLAUGHLIN, and WOOD, JR.,* Circuit Judges.

HARLINGTON WOOD, JR., Circuit Judge.

Plaintiffs-appellants are 488 former pilots of Pan American World Airways ("Pan Am") hired in 1991 either as captains or first officers by defendant Delta Air Lines at the time of Pan Am's bankruptcy. As a part of a bankruptcy transaction Delta also acquired certain of Pan Am's routes, aircraft, and other employees not involved in this litigation.

The problem at the heart of this case arises because plaintiffs, Pan Am's pilots, are generally older than Delta's pilots with whom plaintiffs had to be integrated. To effect the pilot assimilation the Air Line Pilots Association International and

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* Harlington Wood, Jr., Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Delta entered into a supplemental collective bargaining agreement. Plaintiffs now claim that three of the terms of their Delta employment violate New York city and New York state law. Those employment terms relate to seniority rights, post-retirement medical benefits, and salaries.

Plaintiffs filed their complaint in the New York State Supreme Court in 1994 asserting claims under the New York State Human Rights Law ("State HRL"), New York Exec. Law § 296 (McKinney 1993), and the New York City Human Rights Law ("City HRL"), N.Y. City Adminis. Code §§ 8-107(1)(a) and (c) 8-107(17). Specifically, the plaintiffs claim that Delta illegally discriminated and continues to discriminate against them in the terms of their employment on the basis of age, resulting from the manner the plaintiffs were integrated into Delta's pilot seniority list. The plaintiffs also complain of the imposition of a ten-year service requirement before they can become eligible for full company-paid post-retirement medical benefits, and lastly, plaintiffs complain of the imposition of a three-year period before they can reach pay parity with Delta's other pilots.

Delta removed the case from the state court to the district court on the basis that the plaintiffs' cause of action arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et. seq.*, because plaintiffs were seeking to modify the medical benefits plan. Delta in its answer also raised the defense of preemption under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.* ("RLA").

Following discovery Delta moved to dismiss pursuant to Fed.R.Civ.P. 12, or, alternatively, for summary judgment under Fed.R.Civ.P. 56. In its motion to dismiss Delta argued that the state and city HRLs did not apply to plaintiffs' claims, that the Airline Deregulation Act ("ADA") preempted the plaintiffs' claims, and that ERISA preempted the post-retirement medical benefits claims. In a second motion to dismiss Delta argued that the RLA preempted plaintiffs'

claims. In general, Delta argued that the plaintiffs' suit was an attempt to use the city and state HRLs to dictate the economic terms of Delta's purchase of the Pan Am assets, which must fail because there is a direct relationship between the relief sought and Delta's prices, routes, or services, a relationship prohibited by the ADA.

The district court granted Delta's motion to dismiss only on the ground that the ADA preempted plaintiffs' age discrimination claims.[1] The district court did not address Delta's additional arguments on the motion to dismiss, its summary judgment motion or the RLA preemption issues. Delta's motion invoked the ADA's preemption provision which prohibits enforcement of any state or local law which relates to the "price, route or service of an air carrier."[2] U.S.C. § 41713(b)(1) (1996).

Our review of legal conclusions is *de novo* and for clear error as to any factual findings. *In re Vogel Van & Storage, Inc.*, 59 F.3d 9, 11 (2nd Cir.1995).

ANALYSIS

The congressional authority to provide for preemption of state law is based on the Supremacy Clause of Article VI of the Constitution. Based on that authority, the ADA preempts claims arising under state and city statutes which relate to a "price, route or service." 49 U.S.C. § 41713(b)(1) (1996). That standard can be simply stated, but its practical application in particular circumstances is difficult, as this case

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[1] *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F.Supp. 109 (S.D.N.Y.1996).

[2] The ADA in part provides as follows:

> [A] State [or a] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier. . . .
>
> 49 U.S.C. § 41713(b)(1).

amply illustrates. The Supreme Court has not drawn any distinct preemption lines for guidance, and that may not be possible.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992), the Supreme Court did explain that a state law is "related to" airline routes or services if it has "a connection with or reference to airline 'rates, routes, or services.' " Had the court stopped there preemption would have a very broad sweep. However, the court went on to note that "[s]ome state actions may affect [air line fares] in too tenuous, remote, or peripheral a manner" to have a preemptive effect. *Morales*, 504 U.S. at 390, 112 S.Ct. at 2040 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983)); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224, 115 S.Ct. 817, 821-22, 130 L.Ed.2d 715 (1995) (reaffirming the preemption escape hatch set forth in *Morales*).

Therefore, if a state provision is "too tenuous, remote, or peripheral" to have an effect on "price, route or service," the ADA does not preempt that provision. The question in this case is whether the New York state and local laws fit this description.

A. Decision Below

In dismissing the complaint on the basis that the ADA preempted plaintiffs' state law claims, the district court read *Morales* and *Wolens* to formulate a two-part test. 927 F.Supp. at 111. Under the first part of the test, the plaintiffs' claims must involve the enforcement of a state law. Under the second part, the state law must have a connection with or relation to airline prices, routes, or services. Plaintiffs acknowledge that *Morales* and *Wolens* define a two-part test for analyzing ADA preemption issues, but plaintiffs challenge the district court's application of the second part of the test.

Delta argued that any change in the ten-year service requirement for full post-retirement medical benefits and plaintiffs' pay scale would have a direct economic impact on Delta's prices and, thus, would relate to Delta's prices. 927 F.Supp. at 111. Plaintiffs, however, argued that any supposed effect on Delta's prices would be too insignificant to take into account. *Id.* Plaintiffs further argued that Delta could easily absorb the limited number of plaintiffs into its pilot group without the necessity of passing on any added costs to the public. *Id.*

The district court saw the issue not as whether the state laws would have a significant effect on price, but whether the state laws would interfere with the congressional scheme of airline deregulation intended to promote competition so as to achieve "efficiency, innovation and low prices."[3] *Id.* at 111-12. The district court reached this conclusion on the basis of the sound assumption that the states could not be permitted to undo federal deregulation with their own regulations. The district court therefore determined that it was the potential impact of state law that had to be considered, not any actual liability exposure. *Id.* at 112. Otherwise, the district court observed, it would inappropriately involve itself in the merits of the case, not just the initial preemption issue. *Id.* Having found that the plaintiffs "essentially concede[d] the logic of Delta's argument," *id.* at 111, the district court accepted Delta's position that the medical benefit and pay scale provisions of plaintiffs' employment sufficiently related to price and that claims concerning those provisions were therefore necessarily preempted. *Id.* at 112.

The district court also considered the effect the resulting pilot personnel changes might have on "services." In the district court's judgment, it had to determine whether or not pilot staffing was "related to" Delta's "services," rather than what

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[3] 49 U.S.C.App. §§ 1302(a) and (9).

the actual effect on Delta's services would be. *Id.* The district court in interpreting "services" relied on *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir.1995) (en banc), which defined "services" as the "[e]lements of the air carrier service bargain include items such as ticketing, boarding procedures, provisions of food and drinks and baggage handling, in addition to the transportation itself." Delta argued that the changes in pilot staffing would cause turmoil among Delta's pilots, disrupting flight deck relationships and thereby affecting Delta's transportation services. 927 F.Supp. at 112. Plaintiffs argued that Delta made an insufficient showing that changes in the order of the seniority list would result in turmoil on the flight deck, thereby disrupting flight deck relationships to the extent that "services" would suffer. However, the court adopted Delta's argument and found that the plaintiffs' claims would impact transportation itself, not the usual ticketing, boarding procedures, and that therefore claims regarding the seniority list related to services and were preempted. *Id.*

The district court's approach and analysis is not unreasonable considering the difficulties inherent in applying the imprecise ADA preemption standard. However, in light of the Supreme Court's recent narrowing of ERISA's preemption provision, the district court's approach would sweep too many state regulatory statutes under the rug of ADA preemption. Therefore, we cannot accept the district court's approach as applied.

B. Supreme Court Preemption Jurisprudence

The "related to" language of the ADA provides neither a predictable nor practical formula for distinguishing preempted from non-preempted state and local laws, and the Supreme Court has provided little guidance as to the meaning of "related to" after *Morales* and *Wolens*. However, because the language in the ADA's preemption clause is similar to the

language in ERISA's preemption clause, the Supreme Court in *Morales* adopted the same standard. Thus, we may look to ERISA cases for guidance.

The Supreme Court in addressing the preemption provisions of ERISA has been limiting preemption's reach.[4] "Related to" appears to be developing, to some degree, to mean whether state law actually "interferes" with the purposes of the federal statute, in this case airline deregulation. *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 1676-77, 131 L.Ed.2d 695 (1995); *see also Boggs v. Boggs*, 520 U.S. 833, —, 117 S.Ct. 1754, 1760, 138 L.Ed.2d 45 (1997) ("We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects."); *Burgio and Campofelice, Inc. v. New York State Dept. of Labor*, 107 F.3d 1000, 1008 (2d Cir.1997). For example, in *Travelers*, 514 U.S. at 655, 115 S.Ct. at 1676-77, the Court noted that the literal text of ERISA was "clearly expansive," but for practical purposes the statute had to be read more restrictively lest its reach stop nowhere. The Court found that the "related to" language in ERISA's preemption clause did not modify the presumption that Congress did not intend to supplant state law. 514 U.S. at 654, 115 S.Ct. at 1676. Thus, the Court began its analysis with the assumption that "the historic police powers were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655, 115 S.Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). The Court conceded that its prior attempts to draw a preemption line

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[4] *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).

were not always helpful, *id.* at 655, 115 S.Ct. at 1676-77, and that ERISA's text also is unhelpful in determining congressional intent. Thus, the Court explained that it must "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656, 115 S.Ct. at 1677.

In another preemption case recently decided in the ERISA context the Supreme Court in *DeBuono v. NYSA-ILA Medical and Clinical Serv.*, —U.S. —, —, 117 S.Ct. 1747, 1753, 138 L.Ed.2d 21 (1997), found no preemption in a majority opinion written by Justice Stevens, and reversed. The Court *83 explained that the court of appeals in holding otherwise, had relied substantially on a too expansive and too liberal interpretation of "relate to." *Id.* at —, 117 S.Ct. at 1751. It faulted the appellate court "for failing to give proper weight to *Travelers* rejection of a strictly literal reading" of that statute and reiterated the presumption against preemption. *Id.* Because the challenged state law concerned health and safety, an area traditionally regulated by the states pursuant to their police powers, the Court explained that the party arguing in favor of preemption "[bore] a considerable burden of overcoming 'the starting presumption that Congress did not intend to supplant state law.' " *Id.* at —, 117 S.Ct. at 1752 (quoting *Travelers*, 514 U.S. at 654, 115 S.Ct. at 1676). Delta, therefore, would seem to bear the burden of overcoming the initial presumption against preemption by establishing that enforcing the state and city laws would frustrate the purpose of the ADA. *See Travelers*, 514 U.S. at 654, 115 S.Ct. at 1676 ("we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992) (The court's "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the

structure and purpose of the statute as a whole."). In fact, lower courts considering whether the ADA preempts a state claim have required the airlines to meet this burden, and several have found that they fail to do so. We begin with Delta's assertion that the plaintiffs' pay parity claims and benefits claims are preempted because they relate to airline prices.

C. Preemption Based of Affect on Price

In *Ruggiero v. AMR Corp.,* No. C 94-20160 JW, 1995 WL 549010, (N.D.Cal. Sept. 12, 1995), the district court ruled against preemption of the plaintiff's retaliatory discharge claims because the airline put forth no evidence that the plaintiff's claims would frustrate the purposes of the ADA. In addition to citing this lack of evidence, the court also found the plaintiff's retaliatory discharge claims distinguishable from claims for discrimination based on physical characteristics which other courts had held were preempted because Federal Aviation Administration regulations promulgated under the ADA prescribed physical requirements for pilots but did not regulate wrongful termination. *Id.*

Likewise, in *Anderson v. American Airlines, Inc.,* 2 F.3d 590, 597 (5th Cir.1993), the Fifth Circuit ruled against preemption of a claim for monetary damages under a state retaliatory discharge statute. Although the case came before the Fifth Circuit on an appeal from a order denying remand, to resolve the appeal, the *Anderson* court had to determine whether a state's retaliatory discharge statute related to airline services in the context of a mechanic's claim that the airline discharged him in retaliation for filing a workers compensation claim. *Id.* In reaching its holding, the court noted that Congress passed the ADA to deregulate the airline industry and that the ADA authorized the Department of Transportation to establish rules and regulations to promote

civil aircraft safety. *Id.* Thus, the court explained that a claim for monetary relief resulting from a retaliatory discharge would have too remote an effect on services to be preempted, while a claim for reinstatement may have a significant enough effect on services to be preempted under the ADA because the regulations promulgated under the ADA establish the minimum requirements for the certification of airline mechanics. *Id.*

Most notably, the New York appellate court recently upheld several age discrimination and disability and marital status discrimination claims filed by Pan Am flight attendants who became Delta employees as the result of the same transaction as the one at the heart of this case. *Delta Air Lines, Inc. v. New York State Div. of Human Rights,* 229 A.D.2d 132, 652 N.Y.S.2d 253, 257-258 (N.Y.App.Div.1996), *leave to appeal granted,* 657 N.Y.S.2d 891 (N.Y.App.Div.1997).

In reaching its holding the court noted that preemption is not favored absent "persuasive reasons" that either the nature of the subject matter of the state regulation requires preemption or Congress has expressly prescribed *84 preemption, *id.* 652 N.Y.S.2d at 257, and that preemption must be determined on a case-by-case basis, ascertaining whether "the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers." *Id.* 652 N.Y.S.2d at 257-58 (quoting *Colorado Anti-Discrimination Comm. v. Continental Air Lines,* 372 U.S. 714, 719, 83 S.Ct. 1022, 1024-25, 10 L.Ed.2d 84 (1963)). The court reasoned that because compliance with the city and state human rights laws would not interfere with the airline's ability to comply with the ADA, because the ADA did not prescribe what constituted discrimination against airline employees and because a finding either for or against the airline would not frustrate the purpose of the ADA, the ADA did not preempt the plaintiffs' claims. *Id.* 652 N.Y.S.2d at 258. The same might be said in this instance.

Most central to this analysis, Delta is unable to establish that enforcing the city and state human rights laws in this case would frustrate the purpose of the ADA. *See Gade*, 505 U.S. at 98, 112 S.Ct. at 2383. Although the policies behind the ADA are several, the primary motivation for the reform—as the name of the statute indicates—was to deregulate the industry. The ADA was based on a Congressional assumption that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services'. . . ." *Morales*, 504 U.S. at 378, 112 S.Ct. at 2033 (quoting 49 U.S.C. §§ 40101(a)(6), 40101(a)(12) (formerly codified at 49 U.S.C.App. §§ 1302(a)(4), 1302(a)(9))). Permitting full operation of New York's age discrimination law will not affect competition between airlines—the primary concern underlying the ADA. Unlike the regulation of marketing practices at issue in *Morales* or the regulation of frequent flyer programs at issue in *Wolens*, whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency. Although one may argue that shedding older workers can result in savings, such savings will result in a better competitive position only indirectly, if at all. Moreover, to the extent that the scope of the protected group in age discrimination statutes may vary from jurisdiction to jurisdiction, state and local age discrimination laws are little different from generally applicable tax, environmental, or blue sky laws, which as a general matter are not preempted under the ADA.

Moreover, even were we to consider the actual impact of New York human rights laws on Delta's prices, we would reach the same result on the record before us. Initial preemption issues usually do not require extensive examination of the underlying facts of the case. Thus, the district court's reluctance to examine "the particular liability exposure in this case" and deference to Delta's representation that the claims would affect price and services is

understandable. *See* 927 F.Supp. at 112. However, sometimes even a jurisdictional issue may even require a lengthy trial.[5] This may be another such case where preemption can not be easily determined from the pleadings. Thus, while in the abstract post-retirement medical benefits and pilot pay scale could affect price, we do not see that substantiated in this particular case.

Delta claims and the district court accepted that the state laws "would have a direct economic impact on the price it charges consumers." To Delta it is a matter of simple economics that plaintiffs' claims indisputably relate to Delta's rates. In general, Delta argues that an airline's principal source of revenue is from its passenger fares so that whatever an airline has to pay out in salaries and benefits would impact its prices. Delta argues paying out more in salaries and benefits would increase its costs, and it would have to increase its prices to stay in business. Plaintiffs, however, dispute the common economic relationship between costs and prices as applied to airline pricing, and we agree with the plaintiffs that under the peculiar circumstances of airline pricing such a relationship is not a matter of simple economics. As a matter of airline economics, not every airline cost has the requisite connection with and effect on fares to justify preemption. As the Supreme Court recognized in *Morales,* airline fare pricing is based on "yield management," a unique formula largely controlled by the forces of demand and competition, not costs. *See* 504 U.S. at 389, 112 S.Ct. at 2039-40 (explaining yield management without using the term "yield management"). Indeed, in their opening brief in the Supreme Court in *Morales,* fourteen airlines involved in that case, but not including Delta, explained airline pricing practices as follows:

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[5] *See, e.g., Sherrill v. McShan,* 356 F.2d 607, 608 (9th Cir.1966).

> Airlines currently employ extremely sophisticated computer programs to allocate fare on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible. Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to the departure of the flight. . . . Moreover, fare adjustments are also made in order to meet competition from other airlines. (Pls.' Addendum at 29, U.S. Supreme Ct. Resp. Br. in *Morales* at 29-30).

Plaintiffs point out additional support for this pricing argument in a recent airline industry treatise:

> In no other industry has the idea of demand-based pricing been as thoroughly embraced as in the airline industry. *Since the early days of deregulation, domestic carriers and, increasingly, international flag carriers, have realized that they cannot price on a cost plus basis.* Unfortunately, this has led many pricing organizations to ignore cost and, more importantly, supply in making pricing decisions. The simple realization that airline seats are, for the most part, a commodity product has led airlines to match competitive actions quickly without carefully analyzing the implications to the supply/demand balance. Steven S. Kretsch, *Airline Fare Management and Policy, in Handbook of Airline Economics,* 477, 480 (Darryl Jenkins et al. eds., 1995) (emphasis added). Delta does not contend that it adheres to a different pricing practice.

It seems that under this pricing structure, even if plaintiffs' demands would increase fixed costs, they would have an inconsequential impact on Delta's pricing. (According to plaintiffs the total damages sought, including for benefits payable in the future, even if all paid at once by Delta, would

amount to about 0.86% of Delta's 1995 expenses and about 0.81% of Delta's 1995 revenues.) Thus, even if we considered their actual effect on prices, the city and state statutes would not warrant preemption.

D. Preemption Based on Affect on Services

With respect to the seniority claims, the district court accepted Delta's argument that altering seniority would disrupt flight deck harmony and thus affect services. However, the record does not support that claim. Plaintiffs point out that in a pending summary judgment motion also filed by Delta, Delta claimed it would receive no benefit in discriminating against plaintiffs on the basis of age since seniority affects only the rights between the pilots themselves for the purposes of their bidding for flights and job assignments. In the summary judgment motion, Delta argued that pilot seniority does not affect the company itself. Plaintiffs in turn argue that Delta cannot have it both ways, claiming in one motion that it has no motive to discriminate because seniority is no concern to the company, and then claiming that seniority does affect the company because it impacts flight deck relationships, thereby affecting services. We agree. Thus, even considering the actual effect, Delta seems to have failed to establish that plaintiffs' claims affect its services.

CONCLUSION

In his concurring opinion in *Dillingham Construction*, Justice Scalia labelled the ERISA preemption clause an "illusory test," a description which also fits the similar ADA preemption clause. *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (Scalia, J., concurring). We appreciate the difficulties for all parties, including the district court, but we can offer no bright

line relief. Our only recourse is to apply the ADA preemption provision as we understand its meaning on a case-by-case basis.

In possible preemption areas where common federal and state interests exist, courts should seek, if possible, some reasonable and uniform accommodation which does not frustrate either the full congressional purposes and objectives or state policies in determining the relationship between federal and state laws. If that is not possible, and state law interferes and conflicts with federal law, then federal law must prevail. Clearly state law cannot interfere, conflict with, or frustrate federal law lest it be federal law that is preempted by the state. If state laws, however, are preempted merely because they can be said to broadly and generally "relate to prices or services" only in some tenuous, remote or peripheral way and thus preempted, then it is federal law which is unnecessarily interfering with legitimate state laws and policies. We do not believe that congressional intent should be so broadly interpreted without clear justification.

In this case the New York state and local laws do not directly affect prices, routes or services and although enforcement of the claims may have some effect on prices, routes or services, nothing in the record suggests that this effect is the type of effect which Congress intended to prohibit under the ADA. Thus, the supposed state interference is too "tenuous, remote or peripheral" to justify the preemption of New York's applicable laws, and we do not believe that we may sustain the district court's finding of preemption on this record. To borrow the flight vernacular that the First Circuit used in *French v. Pan Am Express Inc.*, 869 F.2d 1 (1st Cir.1989), New York's laws have not yet been "grounded."

The other related issues pled were neither discussed or resolved by the district court, so we will not attempt to resolve them here. They remain in the case for the further consideration of the district court as it may deem necessary.

This case must therefore be remanded to the district court for further consideration of those issues.

REVERSED AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

No. 99-9359.

MARK ABDU-BRISSON, *et al.*,
Plaintiffs-Appellants,
v.

DELTA AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Defendants-Appellees.

Argued: Nov. 6, 2000
Decided: Feb. 12, 2001

Before KEARSE, McLAUGHLIN, and STRAUB, Circuit Judges.

McLAUGHLIN, Circuit Judge:

Plaintiffs are several hundred pilots who were employed by the now-defunct Pan American World Airways, Inc. ("Pan Am"). They were hired by Delta Air Lines, Inc. ("Delta") pursuant to an Asset Purchase Agreement between the two airlines. The pilots filed an age discrimination action in New York State Supreme Court challenging three specific terms of their employment with Delta. Delta removed the case to the United States District Court for the Southern District of New York (Baer, *J.*), and eventually filed a motion for summary judgment. The district court granted Delta's motion, finding that Plaintiffs had failed to establish a *prima facie* case of age discrimination, and dismissed Plaintiffs' complaint. Plaintiffs now appeal.

We hold that, while the district court erroneously concluded that Plaintiffs had not met their *prima facie* burden, summary judgment for Delta was nevertheless appropriate because Plaintiffs adduced no evidence that Delta's legitimate non-discriminatory explanations for each of the challenged employment terms were false. Accordingly, we affirm the decision of the district court.

BACKGROUND

A. Facts

This age discrimination action against Delta has an unlikely origin, rising, as it does, from the ashes of the bankruptcy of Pan Am. In January 1991, Pan Am finally succumbed to two years of crushing financial pressures caused by the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and the dismal economic conditions that followed. Seeking protection from its creditors, Pan Am filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

In its attempt to hammer out a reorganization plan, Pan Am contemplated the sale of some or all of its assets. By the early spring of 1991, Pan Am was actively shopping its assets to its competitors. Pan Am representatives met with several senior officers of Delta to pitch Pan Am's assets. Included in Pan Am's written presentation was a chart demonstrating that Pan Am expected half of its pilot force to retire within five years, (compared to only about 12% at Delta). Presumably, this was viewed as a selling point because it anticipated a reduced cost structure down the road for whoever purchased Pan Am's assets. Shortly after that meeting, Delta began a due diligence campaign to evaluate the Pan Am assets.

The due diligence operation was headed up by Delta's Vice President of Flight Operations, Harry Alger. Alger quickly concluded that Pan Am's pilot retirement projections were too rosy, due, at least in part, to the "two-step bid down"

system that Pan Am employed. A commercial airline cockpit crew includes a captain, a first officer (also known as a co-pilot), and, usually, a flight engineer (also known as a second officer). The Federal Aviation Administration ("FAA") requires that captains and first officers retire from those positions upon reaching the age of 60. A "two-step bid down" system allows captains who have reached the mandatory retirement age to "bid down" and continue to fly as flight engineers, a cockpit position that has no FAA-mandated retirement age. In 1991, Delta, by comparison, did not permit captains and first officers over the age of 60 to bid down for flight engineer positions, although it did permit them to hold ground positions with the airline. It was true that Pan Am employed many pilots approaching the age of 60, but Alger believed that few of them would, in fact, retire, surmising most would simply bid down for flight engineer positions and stay on the payroll.

In May 1991, Alger reported his conclusion to his supervisor, Rex McClelland. McClelland's notes of the conversation state that "Pan Am is burdened with a two-step bid down system and has several 'aged' flight engineers, some in their 70s and one in particular, age 72 plus (born in 1919)." In other undated notes, Alger denigrated the Pan Am personnel as a "Contaminated workforce especially since 1987." He further noted that 68 pilots were over age 60 and four were over age 70. Alger concluded that 50% of the Pan Am workforce would not retire until 2001—not 1995 as Pan Am had advertised. In another set of undated handwritten notes, Alger, ruminating over the potential labor conflicts that could emerge out of the integration of Pan Am personnel, wrote, "Long Term potential [for labor strife] put here after the Bad Apples have long since retired."

Despite this apparent unhappiness with the age of Pan Am's cockpit personnel, Delta continued to pursue the acquisition of Pan Am assets. By July 1991, Delta had agreed in principle

to pay $260 million for Pan Am's profitable transatlantic routes, the Pan Am Shuttle, which offered hourly service between Boston, New York and Washington, D.C., and the aircraft which flew those routes. (Delta's competitor airlines quickly launched a bidding war that escalated the price of the Pan Am assets dramatically.) On July 27, 1991, Delta entered into an Asset Purchase Agreement ("APA") with Pan Am whereby Delta would pay $416 million in cash and would assume certain Pan Am liabilities including $70 million in aircraft mortgages and up to $100 million of previously issued Pan Am passenger tickets on the purchased routes. The APA also provided that Delta would offer permanent employment to at least 6,600 Pan Am employees, including at least 700 of Pan Am's approximately 2,600 pilots. However, the APA specifically stated that, "Buyer [Delta] will determine in its sole discretion ... the terms and conditions of [the Pan Am employees'] employment." On August 12, 1991, the deal was approved by the United States Bankruptcy Court for the Southern District of New York. *See Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y.1994).

The APA set up a procedure whereby Delta would first close on the Shuttle assets, and then on the Pan Am transatlantic operations shortly thereafter. Delta targeted September 1, 1991 for the closing of the Shuttle acquisition and November 1, 1991 for all remaining aspects of the APA. Additionally, Delta's management decided that it wanted the acquisition to be a "turnkey operation"—i.e., ownership of the assets would be transferred from Pan Am to Delta without any disruption in service. Thus, the Shuttle, which would, on August 31, be a Pan Am operation, would become, on September 1, a fully functioning Delta operation. This turnkey feature would eliminate the necessity for ticket refunds and minimize passenger alienation. Delta, however, needed to overcome several obstacles before it could meet these objectives. The most formidable was the integration of Pan Am pilots into the Delta's pilot seniority list.

1. Seniority Integration Methodology

The APA required Delta to hire at least 700 Pan Am pilots. As a practical matter—and quite apart from the APA—Delta needed to hire Pan Am pilots to fly the newly acquired transatlantic routes. This was because Pan Am's transatlantic routes were flown primarily with Airbus 310 ("A-310") aircraft, a twin-engine widebody jet. Since the A-310 makes over-ocean voyages with only two engines, the FAA mandates that pilots of that aircraft receive special training addressing the particular safety concerns presented. Delta had not owned any A-310s, and thus none of its pilots were qualified to fly that aircraft. Therefore, in order to meet its turnkey objectives, Delta needed to hire Pan Am pilots who were qualified on the A-310.

Delta had purchased, in the transatlantic routes, the cream of the Pan Am crop; and the pilots who flew those routes were among the most senior at Pan Am. For commercial airline pilots, seniority is everything. Airlines maintain seniority lists ranking each of their pilots by their length of service for the particular airline. Each month, to obtain work assignments, pilots bid for particular positions (captain, first officer, second officer), on particular aircraft, flying particular routes out of particular airports, some more desirable than others. Assignments are by seniority.The seniority status of Delta's pilots was protected in the collective bargaining agreement Delta had with the pilots' labor union, the Air Line Pilots Association ("ALPA").[1] As is the custom in the airline industry, that agreement required Delta to place newly hired pilots at the bottom of Delta's seniority list, regardless of the length of cockpit experience the newly hired pilot may have had with other airlines. (For this reason, pilots typically spend

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[1] ALPA finds itself a defendant in this action only because it was joined as a co-defendant by Delta, pursuant to Fed.R.Civ.P. 19, as its presence was necessary for complete relief between the parties.

their entire careers with a single airline; the switching costs for senior pilots are too high.) However, the senior Pan Am pilots that Delta needed made it clear that they would not leave Pan Am, even if it was in bankruptcy, if they were to be cast down to the bottom of the Delta pilot seniority list. Thus, to close the APA and meet its turnkey objectives, Delta had to negotiate a concession from ALPA that would amend the collective bargaining agreement to let Delta integrate the Pan Am pilots into the Delta seniority list.

The existing Delta pilots had to protect their own turf. They were understandably concerned that the APA and the integration of Pan Am pilots would dilute their own status on the Delta seniority list. After extensive analysis of the impact of various integration methodologies, Delta and ALPA eventually agreed on a "modified status ratio methodology" that would spread Pan Am pilots equitably throughout Delta's seniority list.

The starting point for the integration was the position held by the most senior Delta pilot of whatever aircraft was deemed to be most nearly equivalent to the A-310. Delta deemed its Boeing 767ER ("B-767ER") to be most equivalent to the A-310 because both were long-haul twin-engine aircraft, although the B- 767ER was not cleared for over-ocean voyages. Delta's most senior B-767ER pilot occupied spot #590. Thereafter, the methodology separately integrated the Pan Am captains, first officers and flight engineers, according to a ratio based on the number of comparable positions expected to exist at Delta, in the absence of the APA, as of the end of 1992.[2] Thus, the formula called for dividing the number of Delta captain positions (at B-767ER captain level

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[2] The methodology used the number of Delta pilot positions anticipated (before the Pan Am acquisition) as of year end 1992 to account for the Delta pilots' expectation of significant job growth within the airline, which, as of the fall of 1991, had not yet occurred.

and below) anticipated to exist as of the end of 1992—that is, 3,360—by the number of Pan Am captains eventually hired by Delta—286. This resulted in a ratio of approximately twelve to one. Thus, one Pan Am captain was integrated after every twelve spots beneath #590—at #603, #616, #629, #641 and so on. After all the Pan Am captains had been integrated, the Delta first officers and flight engineers were then ratioed with their acquired Pan Am counterparts, resulting in one Pan Am position being created after each ten or eleven Delta positions throughout the remainder of the seniority list.

While the modified status ratio methodology gave the acquired Pan Am pilots enhanced bidding seniority vis-a-vis new hires, it also resulted in placing many former Pan Am pilots in spots below Delta pilots with less cockpit experience. Thus, once they moved over to Delta, several Pan Am pilots were relegated to cockpit positions, aircraft, and routes less desirable than those they had flown at Pan Am. For example, some 55-year-old Pan Am pilots found themselves flying in positions junior to 35-year-old pilots who had been with Delta their entire career. However, the Pan Am pilots were integrated in seniority order—that is, within the integrated seniority list, and thus, Pan Am pilots maintained their seniority relative to other Pan Am pilots.

On August 30, 1991, Delta and ALPA entered into a supplemental collective bargaining agreement authorizing Delta to implement the modified status ratio methodology to integrate the Pan Am pilots into the Delta seniority list on November 1, 1991, the same day that the final aspects of the acquisition were scheduled to close.

Immediately after the execution of the supplemental collective bargaining agreement, Delta began to offer employment to qualified Pan Am pilots according to their relative seniority on the Pan Am seniority list, ultimately hiring 774 Pan Am cockpit personnel. In addition to the integration methodology, Delta set two other terms of

employment for the Pan Am pilots that are at issue in this case: a ten-year service requirement for fully paid post-retirement medical benefits and a pay scale that increased pay rates from Pan Am levels to Delta levels gradually over three years.

2. Post-Retirement Medical Benefits

Years ago, Delta management had instituted a ten-year service requirement before Delta would pay the full cost of a non-pilot employee's post-retirement medical insurance premiums. The ten-year service requirement was eventually applied to Delta's pilots when Delta and ALPA entered into a collective bargaining agreement in October 1990. However, in August 1991, the ten-year service requirement was waived to exempt all pilots who were on the Delta seniority list as of August 27, 1991 and had reached age 50 on or before January 1, 1992.

Because the Pan Am pilots were not integrated into the seniority list until November 1, 1991, none of them qualified for this grandfather clause. As discussed above, at the time of the APA, Delta did not permit its captains and first officers to bid down for flight engineer positions after they had reached the FAA-mandated retirement age of 60. Thus, any Pan Am pilots who were over 50 at the time of the APA would not be able to qualify for fully paid post- retirement medical benefits unless they were willing to accept employment in a ground position after they turned 60.

3. Pay Scale Disparity

Due to Pan Am's extreme financial distress when the APA deal was struck most Pan Am employees were earning significantly less than their Delta counterparts, and the pilots were no exception. When Delta offered employment to the Pan Am pilots, it did so at their pre-existing Pan Am pay rates with scheduled incremental increases to parity with Delta's

pay scale spread out over three years. Delta's pilot pension benefits were calculated based upon the pilot's final average earnings (defined as the one-year average of the best 36 months' earnings over the final ten years of employment). Thus, by not immediately jumping all Pan Am employees up to the Delta pay scale, the Pan Am pilots who retired within six years of the closure of the transaction would receive a reduced pension benefit vis-a-vis a similarly situated Delta pilot.

Eventually, 774 Pan Am pilots accepted Delta's offer of employment. Because Delta offered positions according to Pan Am's seniority list, Delta ended up hiring a very senior group of pilots. Approximately 95% of the Pan Am pilots hired by Delta were age 40 or older and 70% were age 50 or older. The acquisition of the Shuttle assets closed on September 1, 1991, the remainder of the APA closed on November 1, 1991, and Delta accomplished its turnkey objectives. Pan Am, on the other *465 hand, ceased all operations in December 1991, and one of the most venerable names in American aviation was liquidated shortly thereafter, leaving thousands of Pan Am pilots and employees not hired by Delta jobless.

B. Procedural History

In 1994, Plaintiffs, 488 former Pan Am pilots and flight engineers who were hired by Delta, filed this suit in New York State Supreme Court alleging violations of the New York State Human Rights Law, N.Y. Exec. Law § 296 ("State HRL") and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-107(1)(a), (c),-107(17) ("City HRL"). They alleged that Delta had discriminated against them based upon their age by implementing the seniority list integration methodology, the ten-year service requirement for full post-retirement medical benefits and the three-year period of pay disparity. More specifically, Plaintiffs alleged that Delta knew it was hiring a group of Pan Am pilots that was, by and

large, very senior, and that Delta crafted the terms of employment with the specific intent of prejudicing them vis-a-vis their largely younger Delta counterparts.

Delta removed the case to the United States District Court for the Southern District of New York (Baer, J.) on the ground that Plaintiffs' claims arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, insofar as the remedies sought by the Plaintiffs required the modification of a medical benefits plan. Once in federal court, Delta quickly moved for dismissal of the complaint on the ground that the claims therein were preempted by ERISA and the Airline Deregulation Act, 49 U.S.C. § 41713 ("ADA"), or alternatively, for summary judgment.

In May 1996, Judge Baer granted Delta's motion to dismiss, finding that Plaintiffs' state law claims were preempted by the ADA. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F.Supp. 109 (S.D.N.Y.1996). (The district court did not at that time reach Delta's other preemption arguments or the motion for summary judgment.) The Plaintiffs timely appealed to this Court. On that appeal, Delta argued that, as a jurisdictional matter, Plaintiffs' claims were preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). We reversed Judge Baer's decision based on the ADA, declining to rule on Delta's new RLA argument. We remanded to the district court for consideration of the additional preemption arguments and Delta's motion for summary judgment. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2d Cir.1997).

On remand, Judge Baer, rejecting Delta's remaining preemption arguments, denied its motion to dismiss for lack of subject matter jurisdiction. *See Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ. 8494(HB), 1999 WL 64436 (S.D.N.Y. Feb. 9, 1999). Finally, in October 1999, Judge Baer granted Delta's motion for summary judgment and

dismissed all of Plaintiffs' claims on the merits. *See Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ. 8494(HB), 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999). Judge Baer ruled that Plaintiffs had failed to establish a *prima facie* case of age discrimination as to any of the three challenged terms of employment. *See id.* Plaintiffs now appeal that order.

DISCUSSION

A. Standard of Review

We review a district court's grant of summary judgment *de novo*. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 40 (2d Cir.2000). Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). A motion for summary judgment must be rejected "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When making this determination, the court must view the evidence in the record in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *See Weinstock*, 224 F.3d at 41.

It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases. This Court has stated that: "the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to ... other areas of litigation." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985). Much more recently, the Supreme Court "reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)).

Further, it is axiomatic that an appellate court may affirm the judgment of the district court on any ground fairly supported by the record. *See Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir.1997) (citations omitted). Thus, we may affirm a grant of summary judgment for different reasons than those relied upon by the district court. *See id.*

B. Delta's Motion for Summary Judgment

The State HRL makes it unlawful for an employer "to discriminate against [an] individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age." N.Y. Exec. Law § 296 3-a. The City HRL prohibits the same conduct. N.Y. City Admin. Code § 8-107(1)(a). Although there are differences between the State HRL, the City HRL and the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, age discrimination suits brought under the State HRL and City HRL are subject to the same analysis as claims brought under the ADEA. *See Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir.1997). We, in turn, analyze ADEA claims under the same burden shifting framework as claims brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq. See Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir.2000). Thus, we analyze an age discrimination claim brought under the State HRL and City HRL as we would any other Title VII claim.

Under this framework, first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a plaintiff must first establish a *prima facie* case of age discrimination. *See id.* Once the plaintiff has made out a *prima facie* case, the employer is required to offer a legitimate, nondiscriminatory business rationale for its actions. *See id.* If the employer articulates such a reason, the presumption of age discrimination dissolves, and the burden shifts back to the plaintiff to prove that the employer's stated

reasons are merely pretextual and that age discrimination was the true reason for the adverse employment action. *See id.*

1. The Prima Facie Case

To establish a *prima facie* case of age discrimination, a plaintiff must show four things: (1) he is a member of the protected class;[3] (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of age discrimination. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817; *Weinstock,* 224 F.3d at 42. A plaintiff's burden of establishing a *prima facie* case is *de minimis. See Cronin v. Aetna Life Ins. Co.,* 46 F.3d 196, 203-04 (2d Cir.1995). The requirement is neither "onerous," *Fisher v. Vassar College,* 114 F.3d 1332, 1335 (2d Cir.1997) (*en banc*) (quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), nor "intended to be 'rigid, mechanized or ritualistic.' " *Meiri,* 759 F.2d at 996 (quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)). The district court concluded that Plaintiffs here had failed to meet the fourth component of their *prima facie* burden. Specifically, Judge Baer held that, because Plaintiffs were not similarly situated to the Delta pilots in all material respects, the differences in treatment did not prove any age-based animus. *See Abdu-Brisson,* 1999 WL 944505.

On appeal, Plaintiffs contend that Judge Baer erred when he embraced the notion that the *only* way a plaintiff can make out an inference of discrimination is to demonstrate that he

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[3] While one must reach the age of forty before falling under the protection of the ADEA, *see* 29 U.S.C. § 631(a), the employment provisions of the State HRL apply to all employees over the age of eighteen, *see* N.Y. Exec. Law § 296(3-a)(a), and the employment provisions of the City HRL do not have any specific age limitation, *see* N.Y. City Admin. Code § 8-107(1).

was treated differently from other similarly situated employees. Plaintiffs concede that, while such a showing of disparate treatment is probably the most common way to create an inference of discrimination, it is not the *only* method. They contend that Delta management's singular, laser-like focus on the age and retirement schedule of the Pan Am pilots, most graphically represented by Harry Alger's several written derogatory comments, sufficiently evinces the discriminatory intent needed to make out the *prima facie* case. This argument is not without appeal.

At the outset, we concede that the case law on this particular point—whether a discrimination plaintiff *may* or *must* show disparate treatment—is confusing. Courts, including ours, have struggled with this fourth element of the *prima facie* case, as the language of the element itself has "gone through various iterations in the years since *McDonnell Douglas* was decided." Denny Chin & Jody Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L Rev. 659, 663-64 & n. 26 (1998). Indeed, this Court's decisions have occasionally adopted apparently inconsistent positions—even within a single case. *Compare Shumway*, 118 F.3d at 63 ("This last element of a prima facie case *may* be proven by showing that a man similarly situated was treated differently." (emphasis added)) *with id.* at 64 ("To establish the fourth element of a prima facie case, Shumway *must* show that she was treated differently from 'similarly situated' males." (emphasis added)); *see also Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37-38 (2d Cir.1994) (noting the many types of circumstances that could create a permissible inference of discriminatory intent).

In the run of the mill discrimination cases, this may/must controversy is of little consequence because a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who

suffered no such fate. This is not in any way surprising, for disparate treatment is the essence of discrimination. However, cases occasionally arise where a plaintiff cannot show disparate treatment only because there are no employees similarly situated to the plaintiff. A simple example of such a case is where an employer has only one employee. If that employee were fired for a discriminatory reason, and no one was hired to replace him, he could never demonstrate disparate treatment because there is no point of comparison. Bearing in mind the flexible spirit of a plaintiff's *prima facie* requirement, *see Meiri,* 759 F.2d at 996, it stands to reason that, in such a case, the plaintiff should be able to create an inference of discrimination by some other means.

While Delta is a long way from the days when it had only a single employee, the 488 Plaintiffs in this case find themselves in a similar conundrum: they are in a class all by themselves. Because all the Pan Am pilots hired by Delta were subjected to the same three employment terms challenged in this action, and because the Pan Am pilots differed materially from the pre-APA Delta pilots in terms of their airline of origin and career expectations, there are no Delta employees similarly situated to Plaintiffs who did not suffer the adverse employment actions. Under the "must" construction of the fourth *prima facie* element, it would be impossible for Plaintiffs to meet their *prima facie* burden, because, like the lone employee in the example, they have no appropriate point of comparison with which to show disparate treatment. This presents the grotesque scenario where an employer can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated employees are victimized.

For the foregoing reasons, we conclude that a showing of disparate treatment, while a common and especially effective method of establishing the inference of discriminatory intent necessary to complete the *prima facie* case, is only one way

to discharge that burden. This position is consistent with our prior decision in *Chambers*, where we wrote that the inference of discriminatory intent could be drawn in several circumstances including, but not limited to: the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge. *Chambers*, 43 F.3d at 37 (citations omitted).

* * * *

Having reviewed the record, we conclude that Plaintiffs have produced enough evidence to meet their *de minimis* burden of raising an inference of discriminatory intent by Delta. While it is true that the stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination, *see Woroski v. Nashua Corp.*, 31 F.3d 105, 109-110 (2d Cir.1994), we have held that when "other indicia of discrimination are properly presented, the remarks can no longer be deemed 'stray,' and the jury has a right to conclude that they bear a more ominous significance." *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 56 (2d Cir.1998).

Here, Plaintiffs have shown that Alger, the Delta management representative assigned to investigate and evaluate the Pan Am acquisition, made numerous comments about the age of the Pan Am pilot force, referring to them as "contaminated" and "Bad Apples." Even if his pattern of derogatory statements could be dismissed as "stray" under *Woroski*, by no means a certainty, when Alger's comments are viewed against the background of Delta's all-consuming interest in the age and projected retirement rates of the Pan Am pilots, they inescapably lead to the conclusion that Delta's actions

may indeed have been motivated by age-based animus. Once that possibility has been demonstrated, at this stage in the analysis where a plaintiff's burden is *de minimis*, Plaintiffs have raised an inference of age discrimination.

Thus, while we agree with the district court that Plaintiffs satisfied the first three elements of their *prima facie* case, we disagree with the conclusion that Plaintiffs failed to create an inference of discrimination. Therefore, we find that Plaintiffs successfully established their *prima facie* case of age discrimination.

2. Delta's Non-Discriminatory Rationale

The *prima facie* case is not the end of the story. If a plaintiff successfully presents a *prima facie* case, the employer may rebut it by articulating legitimate and non-discriminatory reasons for the adverse employment action. *See Burdine*, 450 U.S. at 254, 101 S.Ct. 1089; *Weinstock*, 224 F.3d at 42. A defendant meets his burden if he presents reasons that, "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr.*, 509 U.S. at 509, 113 S.Ct. 2742 (emphasis omitted); *see also Schnabel*, 232 F.3d at 88. Here, Delta has presented legitimate, non-discriminatory reasons for each of the three employment terms challenged by Plaintiffs.

a. Seniority Integration Methodology

As discussed above, at the time of the APA, the relative bidding seniority of the Delta pilots was protected in Delta's collective bargaining agreement with ALPA. Before Delta could offer the Pan Am pilots bidding seniority positions above those of new hires, Delta and ALPA had to amend the collective bargaining agreement. Indeed, the APA itself expressly provided that an amendment to the ALPA collective bargaining agreement was a condition precedent to the closing of the acquisition. Delta has presented evidence that it accepted the modified status ratio methodology

"because of its belief that it was a reasonable methodology," and "because it believed that this reasonable methodology was likely to be approved by ALPA." Both of these reasons are undeniably legitimate and non-discriminatory.

b. Post-Retirement Medical Benefits

Prior to entering into the APA, Delta required ten years of service before a pilot qualified for fully-paid post-retirement medical benefits. In August 1991, Delta waived the requirement for all pilots who reached the age of fifty by January 1992, so long as they were on the Delta seniority list by August 27, 1991. Delta did not extend this grandfather clause to Plaintiffs, who were not integrated into the seniority list until November 1991. Delta's stated reason for this was that the service requirement was a company-wide policy initiated to reduce the costs of providing medical benefits. An extension of the grandfather clause would undoubtedly increase the cost of the benefit. Such financial motivations are legitimate business reasons for an employment action, even where "the motivating factor is correlated with age." *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

c. Pay Disparity

When Delta hired Plaintiffs, it did so at their existing Pan Am pay rates with scheduled increases to Delta's higher pay rates staggered over three years. Delta has produced deposition testimony that the reason behind this initial disparity was that under its then-existing financial conditions, Delta could not afford the additional costs. These economic concerns are legitimate business reasons for the initial pay disparity.

3. Plaintiffs' Evidence of Defendant's Actual Discriminatory Motives

Once the employer has articulated non-discriminatory reasons for the challenged employment actions, the presumption of

discrimination vanishes and the burden shifts back to the plaintiff to come forward with evidence that the employer's proffered explanations were merely pretextual and that the actual motivations more likely than not were discriminatory. *See St. Mary's Honor Ctr.*, 509 U.S. at 510-511, 113 S.Ct. 2742; *Weinstock*, 224 F.3d at 42.

The Supreme Court illuminated this requirement in *Reeves*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105, and this Court recently had the opportunity to apply *Reeves* in the summary judgment context. *See Schnabel*, 232 F.3d at 83. In *Schnabel*, we interpreted *Reeves* to reject any categorical rule requiring age discrimination plaintiffs to offer, in addition to their *prima facie* case and evidence of pretext, further evidence that age discrimination was the actual motivation in order to satisfy their burden. *See id.* at 90. Once a plaintiff has made a showing that the defendant's asserted reason for the employment action was false, *Reeves* mandates "a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.' " *Schnabel*, 232 F.3d at 90 (quoting *Reeves*, 120 S.Ct. at 2106). However, *Reeves* in no way relaxed the requirement that plaintiffs make a showing that the defendant's proffered explanations were pretextual.

Having thoroughly reviewed the record before us, we can find no evidence to suggest that Delta's stated non-discriminatory reasons for the challenged employment actions were false. Therefore, we are led to the conclusion that summary judgment was appropriate in this case.

Plaintiffs attempt to rebut Delta's explanations for the seniority integration methodology by pointing out that when a merger occurs, the negotiations on seniority integration are conducted very differently, with the pilot unions from each airlines negotiating directly. Plaintiffs claim the Pan Am

pilots should have been negotiating directly with ALPA. Of course, the APA in this case was not a merger. Delta acquired specific Pan Am assets, eventually hiring less than one-third of Pan Am's 2,600 pilots. Plaintiffs' analogies to seniority integrations after other airline mergers are thus inapposite.

Plaintiffs do not otherwise contest Delta's assertions that it agreed to the modified status ratio methodology because it seemed reasonable, given the circumstances, and because ALPA was willing to make the necessary concessions. Plaintiffs have presented no evidence that Delta believed the Pan Am pilots should have received a more favorable integration, or that ALPA would have been willing to make greater concessions at the expense of its own members.

As for the post-retirement medical benefits and pay disparity, Plaintiffs have again failed to produce any evidence to suggest that Delta's stated financial rationale was pretextual. There is no evidence in the record that Delta's management was not concerned with containing costs of the acquisition, or that Delta's shareholders would have been willing to accept reduced profits in order to ramp up Plaintiffs' salaries to Delta levels and to extend the waiver of the service requirement for post-retirement health evidence. The written comments of Alger—which, in truth, are not only the centerpiece, but the entirety of Plaintiffs' case—are not sufficient to establish that Delta's stated financial rationale was a ruse.

* * * *

Although Plaintiffs met their *de minimis* burden of establishing a *prima facie* case of age discrimination, they have failed to produce sufficient evidence to support a rational finding that the non-discriminatory business reasons proffered by the defendant for the challenged employment actions were false. *See Weinstock,* 224 F.3d at 50. The plain reality is that these employment actions were business decisions reflecting the grim economic realities affecting

Delta and Pan Am at the time. Delta took full advantage of Pan Am's financial misfortunes, giving Plaintiffs the unenviable choice of joining Delta as second-class citizens or hanging on with Pan Am, which had already filed for bankruptcy. While we sympathize with the pilots who were impaled on the horns of this dilemma, we can find no actionable misconduct by the defendants.

CONCLUSION

We have considered the appellants' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the order of the district court granting summary judgment to the defendant.

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 94 Civ. 8494 (HB).

MARK ABDU-BRISSON, *et al.*,
Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
(joined pursuant to Fed.R.Civ.P. 19),
Defendants.

May 16, 1996.

OPINION AND ORDER

BAER, District Judge:

Currently before the Court are defendant Delta Air Lines, Inc.'s motions to dismiss the complaint and for summary judgment. For the reasons that follow, the motion to dismiss is granted. Accordingly, it is unnecessary to reach the motion for summary judgment.

I. Background

Plaintiffs are 488 of the approximately 774 former pilots for Pan Am World Airways, Inc. who were hired by Delta in the fall of 1991 in connection with Delta's purchase of certain Pan Am assets. Plaintiffs allege that Delta discriminated against them in the terms and conditions of their employment based on their age in violation of the New York State Human Rights Law (State HRL), N.Y.Exec.Law § 296 and the New York City Human Rights Law (City HRL), N.Y.City

Admin.Code §§ 8-107(1)(a) and (c), 8-107(17). Specifically, plaintiffs challenge the manner in which they were integrated into the Delta pilots' seniority list, Delta's requirement that they serve for ten years before they become eligible for full post-retirement medical benefits, and the manner in which their pay is increased over a three-year period to reach parity with existing Delta pilots.

II. Discussion

This action was filed in New York Supreme Court. Delta removed the case to this Court on the ground that plaintiff's complaint "arises under" the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 101 *et seq.* because it seeks to modify the Delta Medical Benefits Plan. This Court has supplemental jurisdiction over plaintiffs' state law claims under 28 U.S.C. § 1367. Delta's motion to dismiss challenges this Court's jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).

In adjudicating pendent state law claims, "a federal court acts essentially as a state court." *Baker v. Coughlin,* 77 F.3d 12, 15 (2d Cir.1996). Therefore, if a state court lacks jurisdiction over a cause of action, the federal court is also deprived of jurisdiction. *See id.* (" 'If a state would not recognize a plaintiff's right to bring a state claim in state court, a federal court exercising pendent jurisdiction, standing in the shoes of a state court, must follow a state's jurisdictional determination and not allow that claim to be appended to a federal law claim in federal court.' " (*quoting Promisel v. First American Artificial Flowers, Inc.,* 943 F.2d 251, 257 (2d Cir.1991), *cert. denied,* 502 U.S. 1060, 112 S.Ct. 939, 117 L.Ed.2d 110 (1992))).

Delta argues that this Court has no jurisdiction on several grounds. Most importantly, Delta contends that plaintiffs' complaint is preempted by the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b)(1). The ADA provides that:

> [A] State [or a] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier. . . .

49 U.S.C. § 41713(b)(1).[1] I agree that this federal law preempts plaintiffs' age discrimination claims and dismiss the complaint on this ground only.

The Supreme Court considered the predecessor to § 41713(b)(1) in two recent opinions. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Court interpreted the term "relating to" as used in the ADA. The Court adopted the interpretation it had applied to the "relates to" language used in ERISA and held that a state law is related to rates, routes or services if it has "a connection with or reference to" them. *Id.* at 384, 112 S.Ct. at 2037. The Court followed its ERISA jurisprudence and noted the expansive reach of the ERISA preemption. *Id.* (citing cases). Preemption does have its limits, however, where the effects of the state law are " 'too tenuous, remote, or peripheral.' " *Id.* at 390, 112 S.Ct. at 2040 (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901, 77 L.Ed.2d 490 (1983)).

The Court next addressed ADA preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995), where it considered the words "enact or enforce any law." Wolens sued American for violation of the Illinois Consumer Fraud Act and breach of contract after the airline retroactively amended its frequent flyer program. The

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[1] Prior to 1994, when Congress reenacted Title 49, the ADA preemption provision applied to state laws "relating to rates, routes, or services of any air carrier." 49 U.S.C.App. § 1305(a)(1). Congress did not intend to make any substantive changes in the revision. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, —n. 1, 115 S.Ct. 817, 821 n. 1, 130 L.Ed.2d 715 (1995) (*citing* Pub.L. No. 103-272, § 1(a), 108 Stat. 745).

Supreme Court held that the ADA preempted the Consumer Fraud Act claim, but not the breach of contract claim. In making this distinction, the Court found that the Illinois statute was a prescriptive rule of state public policy and thus an action based on it involved the enforcement of state law. *Id.*, at — - —, 115 S.Ct. at 823-24. In contrast, state court adjudication of an action based on a private contract did not involve a sufficient imposition of state policy on air carrier operations to warrant preemption. *Id.*, at —, 115 S.Ct. at 824.

Read together, *Morales* and *Wolens* create a two-part test for ADA preemption of state law claims. First, the state law claim must involve the enforcement of a state law. Second, the state law must have a connection with or relation to airline prices, routes, or services. *See Travel All Over The World v. Saudi Arabia,* 73 F.3d 1423, 1432 (7th Cir.1996); *Continental Airlines v. Kiefer,* 920 S.W.2d 274, 281 (Tex.1996).

Plaintiffs do not dispute that this action seeks to enforce a prescriptive state statute that, like the Illinois Consumer Fraud Act, "controls the primary conduct of those falling within its governance." *Wolens,* 513 U.S. at —, 115 S.Ct. at 823. Therefore, the first prong is satisfied. The focus of this dispute is on whether the State HRL and the City HRL relate to prices or services. Delta argues that any change to the ten-year service requirement for full post-retirement medical benefits and the plaintiffs' pay scale would have a direct economic impact on the price it charges consumers. Plaintiffs essentially concede the logic of this argument, but respond that any effect on price would be too insignificant because there are only a limited number of plaintiffs and Delta could easily absorb the added costs rather than pass them along to the public. The issue, however, is not whether enforcement of the state law in this case would have a definite and significant effect on price, but rather whether enforcement of the law would interfere with the congressional scheme of deregu-

lation. *See Morales*, 504 U.S. at 378, 112 S.Ct. at 2034 (finding that Congress included the preemption provision "[t]o ensure that the States would not undo federal deregulation with regulation of their own"). Thus it is the potential impact that must be considered. Any examination of the particular liability exposure in this case would be an evaluation of the merits which is inappropriate on a challenge to the Court's jurisdiction. I agree with Delta that the claims based on the medical benefits and pay scale provisions of plaintiffs' employment contracts are sufficiently related to price and therefore preempted. *Cf. Kiefer*, 920 S.W.2d at 281 (holding that common law tort liability is "clearly" related to price under *Morales* because such liability "cannot but have, in *Morales'* words, 'a significant impact upon the fares [airlines] charge' " (*quoting Morales*, 504 U.S. at 390, 112 S.Ct. at 2040)).

Delta argues that the challenge to the seniority integration plan relates to the services of air transportation because alteration of the seniority list would impact pilot staffing.[2] Major changes in staffing would in turn "cause tremendous turmoil among Delta's pilots," Def.Mem. at 12, and disrupt the "harmonious relationship[s]" in the cockpit that are necessary to the provision of quality air transportation services. Def.Reply Mem. at 6. Plaintiff disputes this factual assertion and claims that once certified, all pilots are "[i]n every important respect ... fungible." Pl.Mem. at 9. Although I find it inappropriate to consider the exact effect personnel changes may have on services, I must analyze whether pilot staffing is "related to" Delta's services.

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[2] Defendant does not claim that changes to the seniority list would affect price because such changes would have a neutral effect on Delta's labor costs. Any increase in pay granted to a plaintiff who was advanced on the list would be offset by the decrease in pay sustained by the Delta pilot who was moved down on the seniority list.

The term "services" has generally been interpreted with reference to the contractual exchange between the air carrier and the consumer. As the Fifth Circuit held, "[e]lements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir.1995) (*en banc*); *see also Travel All Over*, 73 F.3d at 1433. I conclude that the order of a pilot seniority list has a connection with and therefore is "related to" the provision of air carrier services within the meaning of *Morales*. Indeed, pilot staffing is an integral element of "the transportation itself."

Several other courts have found state employment laws are preempted by the ADA. In *Marlow v. AMR Services Corp.*, 870 F.Supp. 295 (D.Hawaii 1994), the plaintiff had been employed by a jetbridge maintenance company as a supervisor. The court held that Marlow's wrongful termination claims based on alleged violations of the Hawaii Whistleblowers' Protection Act and public policy as stated by the Hawaii Supreme Court were preempted by the ADA. Applying the Fifth Circuit's definition, the court found that jetbridge maintenance was a service under the ADA. *Id.* at 299.

Similarly, in *Belgard v. United Airlines*, 857 P.2d 467 (Colo.Ct.App.1992), *cert. denied*, 510 U.S. 1117, 114 S.Ct. 1066, 127 L.Ed.2d 386 (1993), the plaintiffs sued after they had been denied employment as pilots because they had undergone eye surgery to reduce the effects of myopia. The court held that the claims based on the Colorado handicap discrimination statute and related regulations were preempted by the ADA. The court concluded that: any law or regulation that restricts an airlines' selection of employees, based on their physical characteristics, must necessarily have a connection with and reference to, and therefore must be one

"relating to," the services to be rendered by that airline. *Id.* at 471. *See also Lewonchuk v. Business Express, Inc.*, No. CV 940315626S, 1995 WL 781431, at (Conn.Super.Ct. Dec. 15, 1995) (dismissing claim by a pilot "because the ADA preempts a wrongful termination action in which the underlying public policy is a state law").

III. Conclusion

For the reasons discussed above, the motion to dismiss is granted.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 94 Civ. 8494(HB).

MARK ABDU-BRISSON, *et al.*,
Plaintiffs,

v.

DELTA AIR LINES, INC. and the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants.

Feb. 9, 1999.

AMENDED OPINION and ORDER

BAER, J.[1]

Defendant, Delta Air Lines, Inc. ("Delta") moves to dismiss plaintiffs' claims of age discrimination under the New York State and the New York City Human Rights Laws, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Fed.R.Civ.P. For the reasons set forth below, the defendant's motion to dismiss is DENIED.

I. BACKGROUND

The origins of this Complaint stem from Pan Am Airways' ("Pan Am") filing for bankruptcy in January 1991. As a result, in July 1991, Pan Am and Delta entered into an Assets

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[1] Fernando A. Bohorquez, Jr., a third year law student at New York Law School, assisted in the research and preparation of this opinion.

Purchase Agreement ("APA"). Pursuant to the APA, Delta acquired certain Pan Am routes, aircraft, and other employees not involved in this litigation. The APA provided that Delta would hire at least 6,600 Pan Am employees, including approximately 700 Pan Am pilots and flight engineers. The United States Bankruptcy Court for the Southern District of New York approved the APA on August 12, 1991. *See Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y.1994). Plaintiffs are 488 former pilots of the now defunct Pan Am hired by Delta under the APA. Following the execution of the APA, Delta proceeded to integrate the ex-Pan Am pilots and flight engineers into the Delta pilots seniority list in conjunction with the Delta pilots' union--the Air Line Pilots Association ("ALPA"). On August 30, 1991, Delta signed a supplemental collective bargaining agreement ("CBA") where it committed to use a "modified status ratio methodology," approved by ALPA, for creating slots on the seniority list for the ex-Pan Am pilots. Delta hired 774 Pan Am pilots and flight engineers, and placed them into the slots created under the CBA.

Prior to the Pan Am acquisition, Delta had adopted a ten-year service requirement for post-retirement medical benefits. The policy was amended, effective January 1, 1992, to exempt all employees who were on the Delta Seniority List as of August 27, 1991 and had reached age 50 on or before January 1992. Fleming Aff., Ex. 15 at 5. The amendment also allows service at Western Air Lines, which had been acquired by Delta in 1987, to be counted toward the ten-year requirement. *Id.* at 3. In contrast, the 1992 supplement to the Delta Pilot Benefit Handbook provides that former Pan Am American personnel are not included in this grandfather provision. Fleming Aff., Ex. 16 at 3.

Plaintiffs allege that Delta discriminated against them in the terms and conditions of their employment based upon age and thereby violated the New York State Human Rights Law

("NYSHRL"), N.Y. Exec. Law § 296,[2] and the New York City Human Rights Law ("NYCHRL"), N.Y. City Admin. Code §§ 8-107(1)(a) and (c), 8-107(17).[3] Specifically, plaintiffs claim that Delta discriminated on three scores: (1) the fashion in which Delta integrated plaintiffs on to the seniority list; (2) the requirement that the plaintiffs serve ten years before they become eligible for full post-retirement benefits; and (3) the manner in which plaintiffs pay is increased over a three year period to reach parity with the existing Delta pilots.

Plaintiffs originally filed this action in New York State Supreme Court. Delta subsequently removed the case here. Defendant moved to dismiss and argued, among other grounds, that plaintiffs' state law claims were preempted by the Airline Deregulation Act ("ADA"). *See Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F.Supp. 109, 111-12 (S.D.N.Y.1996). This Court agreed, and granted the motion to dismiss. *Id.* at 13. The Second Circuit reversed and remanded, and directed this Court to consider the additional preemption and summary judgment issues raised by the defendant. *See Abdu-Brisson v. Delta Air Lines, Inc.* 128 F.3d 77, 86 (2d Cir.1997).

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[2] The NYSHRL is a comprehensive anti-discrimination statute which prohibits a long list of employment discrimination. Section 296.1 provides: "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age ... of any individual, to refuse to hire or to bar such an individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

[3] Section 8-107 of the NYCHRL provides in similar language: "Employment. It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or discriminate against such person in compensation or in terms, conditions or privileges of employment."

II. DISCUSSION

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The defendant argues that the NYSHRL and NYCHRL are completely or partially preempted by: (1) the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.;* (2) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.;* and (3) the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 101, *et seq.*

Whether federal law preempts a state law is largely a matter of the interpretation of Congressional intent. *See Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994). There are three ways that federal law may preempt state law. First, state law may be explicitly superseded by a federal statute. *See Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd .,* 467 U.S. 461, 469 (1984). Second, under implicit field preemption, Congress may indicate an attempt to occupy an entire field of regulation, in which case the state must leave all regulatory activity in the area to the Federal Government. *Id.* Finally, preemption may occur to the extent that a conflict between state and federal law exists. *Id.* Such preemption arises when compliance with both the state and federal law is impossible or the state law stands as an impediment to the execution and goals of the federal law. *See Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

1. RLA Does Not Preempt Plaintiffs' Claims

Congress enacted the RLA to create a federal scheme that governs the negotiation, interpretation, and enforcement of labor contracts in the railway, and thereafter, airline industries. *See Hawaiian Airlines,* 512 U.S. at 259. Defendant contends that plaintiffs seek to modify the RLA approved CBA under which the current terms of employment were forged. I disagree.

Under the RLA, "[w]here the resolution of a state-law claim depends on the interpretation of the CBA, the claim is pre-empted." *Hawaiian Airlines,* 512 U.S. at 261. Conversely, when the state law claim is based upon a right independent of the CBA and entails an inquiry into factual questions that concern an employer's conduct in the way it does here, the Court is not required to interpret any terms of the CBA, and therefore the state law claim is not preempted. *Id.; see also Shafii v. British Airways, PLC,* 83 F.3d 566, 569-70 (2d Cir.1996) (state law wrongful termination and violation of mediation agreement claims not preempted by the RLA since they rested on rights available under state law that did not require interpretation of the CBA); *Gay v. Carlson,* 60 F.3d 83, 87-88 (2d Cir.1995) (defamation, *prima facie* tort and conspiracy claims not preempted by the RLA since state law provides the exclusive source of these rights and the only issues to be resolved were the employer's conduct and motive).

In the instant case, plaintiffs assert their rights under the NYSHRL and NYCHRL to be free from age discrimination. The issue, then, turns on whether the defendant intended to discriminate. A claim based on a substantive protection against age discrimination that focuses on the issue of an employer's discriminatory animus does not necessitate an interpretation of the CBA such that preemption is required. *See Foy v. Pratt & Whitney,* 127 F.3d 229, 235 (2d Cir.1997) (state law misrepresentation claims against employer that concerned the issue of employers' intent did not require interpretation of the CBA and warrant preemption). In response, defendant contends that the remedies plaintiffs seek—modification of seniority integration, post-retirement benefits, and pay parity schedule—are in fact an attempt to rewrite the CBA. Therefore, defendant maintains, preemption is warranted. However, the Second Circuit has consistently held that it is of little moment that a plaintiffs' state law claim may entail some reference to the CBA. *See Hernandez v.*

Conriv Realty Assocs., 116 F.3d 35, 40 (2d Cir.1997) (not every dispute that tangentially involves a CBA is preempted); *see also Gay*, 60 F.3d at 88-89 (rejecting argument that reference to the CBA in order to assess damages requires preemption under the RLA). Moreover, courts have held that the reordering of seniority lists is an acceptable remedy because victims of discrimination are entitled to relief that entails a rightful place in seniority status. *See Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77-78 (2d Cir.1995) (award of retroactive seniority status falls within the scope of the district court's equitable power to fashion remedies) (citation omitted). Since the plaintiffs' claims do not involve the interpretation of the CBA, the motion to dismiss pursuant to the RLA is denied.

2. ADEA Does Not Preempt Plaintiffs' Claims

Defendant also contends that the ADEA preempts the NYSHRL and NYCHRL since the ADEA provides a safe harbor for seniority systems, whereas State and City laws do not. As a result, the defendant argues that the laws irreconcilably conflict. I disagree. "The ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); 29 U.S.C. § 623(a)(1).[4] As a general matter, the NYSHRL and NYCHRL are governed by the same legal standards as the ADEA and share the same goal. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992). In fact, anti-discrimination employment laws such as the NYSHRL and NYCHRL are integral to the federal scheme designed to combat discrimination. Nevertheless, defendant argues that since the ADEA provides

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[4] Section 623(a)(1) provides that it is unlawful to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

a safe harbor for seniority systems, and the NYSHRL and NYCHRL do not, the laws conflict.

Defendant misconstrues the language of the ADEA. It too, along with the NYSHRL and NYCHRL, prohibits a non-bona-fide, seniority system that acts as a subterfuge.[5] A seniority system built to discriminate on an illegal basis is not bona-fide under the ADEA. *See Acha v. Beame,* 570 F.2d 57, 64 (2d Cir.1978). Thus, it can hardly be said that the NYSHRL and NYCHRL conflict with the ADEA. *See Cable Television Ass'n of N.Y. Inc. v. Finneran,* 954 F.2d 91, 98 (2d Cir.1992) (state law "will be pre-empted when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").[6] Since plaintiffs allege that the seniority system at issue is not bona fide, as a result of intentional discrimination, there is no conflict and preemption must be denied.

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[5] 29 U.S.C. § 623(f) states in pertinent part: "It shall not be unlawful for an employer, employment agency, or labor organization—(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter; 29 C.F.R. § 1625.9(a) states that a "purported seniority system which gives those with longer service lesser rights . . . may, depending on the circumstances, be a 'subterfuge to evade the purposes' of the Act."

[6] Defendant correctly points out that ADEA challenges to seniority systems must allege disparate treatment. *See Lorance v. AT & T Technologies. Inc.,* 490 U.S. 900, 908 (1989) (discriminatory intent is a necessary element of an action challenging a seniority system). Plaintiffs satisfy this burden by alleging intentional discrimination, buttressed by disparate impact evidence which can be used to support a disparate treatment claim.

3. ERISA Does Not Preempt Plaintiffs' Challenges to Delta's PostRetirement Medical Benefits Plan

Lastly, defendant asserts that plaintiffs' challenge to the Delta Pilots Post-Retirement Medical Benefits Plan ("Delta Benefits Plan") is preempted by ERISA. ERISA is a federal law designed to promote and protect the interests of employees and their beneficiaries in benefits plans. *See Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361-62 (1980). ERISA defines an "employment welfare benefits plan" as any program that provides benefits for contingencies such as illness, accident, disability, death, or unemployment. 29 U.S.C. § 1002(1).

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[7] Given this language, defendant argues that since the Delta Benefits Plan is covered by ERISA, and the NYSHRL and NYCHRL clearly "relate" to the Delta Benefits Plan, § 514(a) explicitly preempts the plaintiffs' State and City law claims.

There is no dispute that the Delta Benefits Plan falls within the rubric of ERISA, or that the NYSHRL and the NYCHRL "relate" to an employee benefits plan for preemption purposes. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) (N.Y.SHRL prohibition of employers' employee benefits plan that discriminates on the basis of pregnancy relates to an employee benefits plan for purposes of ERISA

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[7] Section 514(a) provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to an employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a). The term "State Law" includes "all laws, decision, rules, regulations, or other state action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

preemption).[8] However, the inquiry does not end there. ERISA provides a "savings clause," § 514(d), that limits the scope of the otherwise expansive § 514(a) preemption. 29 U.S.C. § 1144(d). Section 514(d) states in pertinent part that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." *Id.* As interpreted by the Supreme Court, this clause dictates that ERISA only preempts state laws that prohibit practices that federal law permits. *See Shaw,* 463 U.S. at 103.

In *Shaw,* the Supreme Court held that to the extent the NYSHRL provided a means of enforcing Title VII mandates, preemption of the NYSHRL would modify and impair federal law within the meaning of § 514(d). *Id.* at 101-02; *see also International Ass'n of Machinists and Aerospace Workers Local Lodge No. 967 by McCadden v. General Electric Co.,* 713 F.Supp. 547, 550-51 (N.D.N.Y.1989) (ADEA and NYSHRL are designed to work together to attack age discrimination in the employment context). Indeed, ERISA does not preempt all NYSHRL claims with respect to benefit plans. If it did, a whole host of state agencies would be prevented from addressing discriminatory employment practices. *See Shaw,* 463 U.S. at 102. Consistent with *Shaw,* I conclude that the plaintiffs' claims fall within the savings clause and are therefore not preempted, since the NYSHRL

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[8] The NYCHRL explicitly accounts for potential conflicts such as the instant matter. "The provisions of this subdivision and subdivision two of this section: (1) as they apply to employee benefits plans, shall not be construed to preclude an employer from observing the provisions of any plan covered by [ERISA] that is in compliance with applicable federal discrimination laws where the application of the provisions of such subdivisions to such plan would be preempted by such act." N.Y. City Admin. Code § 8-107(1)(e). This clause simply parrots the *Shaw* language that a state anti-discrimination law cannot prohibit employment benefits plans which are lawful under federal law.

and NYCHRL prohibitions against age discrimination assist in the enforcement of Title VII mandates.

III. Conclusion

For the reasons discussed above, the motion to dismiss is DENIED and oral argument is scheduled on the motion for summary judgment for February 23, 1999 at 4:00 p.m.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of May two thousand one.

Dkt. No: 99-9359

ABDU-BRISSON, *et al.*,
Plaintiffs-Appellants,

v.

DELTA AIR LINES, *et al.*,
Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filled herein by the appellants Abdu-Brisson, *et al.*

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be take thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

/s/ Beth J. Meador,
Beth J. Meador,
Administrative Attorney

APPENDIX F

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 94 Civ. 8494(HB).

MARK ABDU-BRISSON, *et al.*,
Plaintiffs,

v.

DELTA AIR LINES, INC. and the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
[1] *Defendants*.

Oct. 19, 1999.

MEMORANDUM AND ORDER

BAER, J.

The plaintiffs, former Pan American Airways ("Pan Am") pilots hired by Delta Air Lines ("Delta") in connection with Delta's purchase of certain Pan Am assets, commenced this class action lawsuit in 1994. Employing both disparate treatment and disparate impact theories of discrimination, the complaint alleges that Delta discriminated against the plaintiffs on the basis of age in violation of the New York State Human Rights Law (N.Y.SHRL), New York Executive Law § 296 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y. City Admin. Code §§ 8-107 *et seq.*,

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[1] Defendant Air Line Pilots Association is joined under Rule 19 for relief purposes only, and no substantive allegations are pled against it. (*See* Complaint ("Compl.") ¶ 3.)

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Delta now renews its motion for summary judgment. For the reasons stated below, the defendant's motion is GRANTED.

I. BACKGROUND

A. Factual Background

After Pan Am filed for bankruptcy in January 1991, it entered into an Assets Purchase Agreement ("APA") with Delta in July 1991 through which Delta acquired certain Pan Am routes, aircraft, and other employees not involved in this litigation. The APA, approved on August 12, 1991 by the U.S. Bankruptcy Court for the Southern District of New York, provided that Delta would hire at least 6,600 Pan Am employees, including approximately 774 Pan Am pilots and flight engineers. The plaintiffs are 488 former pilots, who ranged in age from 27 to 59 in 1991, of the now defunct Pan Am who were hired by Delta under the APA.

On August 30, 1991, Delta signed a supplemental collective bargaining agreement with the Delta pilots' union—the Air Line Pilots Association ("ALPA")—whereby it committed to use a "modified status ratio methodology" for integrating the ex-Pan Am pilots into Delta's pre-existing seniority list. This methodology created positions for the Pan Am pilots that spread them throughout Delta's seniority list, rather than placing them at the bottom of the list. The starting point for the first Pan Am pilot slot was the position held by the most senior Delta pilot of the aircraft deemed to be most nearly equivalent to the specific aircraft acquired from Pan Am. The remaining pilot jobs at Delta were then ratioed with their newly-hired Pan Am counterparts, which resulted in one Pan Am slot being carved out between every tenth or eleventh Delta slot throughout the remainder of the list. Thus, although some Pan Am pilots were placed in slots below younger Delta

pilots,[2] the Pan Am pilots were integrated into the seniority list so as to maintain their seniority relative to other (former) Pan Am pilots. In other words, amongst the Pan Am pilots hired by Delta, the most senior Pan Am pilots were given the most senior of the newly-created slots.

Prior to the Pan Am acquisition, Delta had adopted a ten-year service requirement for post-retirement medical benefits. This plan requires an employee to work for Delta for 10 years before Delta will pay the full cost of his or her post-retirement medical insurance premiums. The policy was adopted for Delta pilots in October 1990 and was later amended to exempt all employees who were on the Delta Seniority List as of August 27, 1991 and had reached age 50 on or before January 1, 1992. Because they were integrated on November 1, 1991, potentially eligible plaintiffs were excluded from this waiver.

Additionally, at the time of the APA most Pan Am employees, including pilots, were paid less money than their Delta counterparts. As a result, Delta hired all Pan Am employees at their then-existing Pan Am pay rates with scheduled incremental increases to parity with Delta's higher wages spread out over three years.

The plaintiffs now allege under both disparate treatment and disparate impact theories that Delta discriminated against them in the terms and conditions of their employment based on age and thereby violated the New York State Human Rights Law ("State HRL"), N.Y. Exec. Law § 296, and the New York City Human Rights Law ("City HRL"), N.Y. City

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[2] The plaintiffs' papers fail to offer many, if any, statistics on this score. One rather ambiguous figure was contained in paragraph 39 of the plaintiffs' Rule 56.1 Statement, which reads: "The placement of the Pan Am pilots on the Delta Seniority List resulted in instances where 55 year-old former Pan Am pilots were flying junior to 35 year-old original Delta pilots." (Pls.' Rule 56 .1 Statement ¶ 39.)

Admin. Code §§ 8-107(1)(a) and (c), 8- 107(17). More specifically, the plaintiffs claim that Delta discriminated against them on three grounds: (1) the way in which Delta integrated them into the seniority list; (2) the requirement that the plaintiffs serve ten years with Delta before they become eligible for full post-retirement benefits; and (3) the manner in which the plaintiffs' pay was increased over a three-year period to reach parity with the existing Delta pilots.

B. Procedural Background

The plaintiffs originally commenced this action in the York State Supreme Court in 1994. Delta subsequently removed the case to this Court on the basis that the plaintiffs' cause of action arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, because the plaintiffs were seeking to modify the medical benefits plan. Delta later made motions to dismiss and for summary judgment, arguing, *inter alia*, that plaintiffs' state law claims were preempted by the Airline Deregulation Act ("ADA"). This Court granted the motion to dismiss, *see Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F.Supp. 109 (S.D.N.Y.1996), but the Second Circuit reversed that decision and remanded the case for this Court to consider the additional preemption and summary judgment issues raised by Delta. *See Abdu- Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2d Cir.1997). On February 9, 1999, I denied the defendants' motion to dismiss for lack of subject matter jurisdiction, leaving resolution of the current motion for summary judgment before the Court. *See Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ. 8494, 1999 WL 64436 (S.D.N.Y. Feb. 9, 1999).

II. DISCUSSION

A. Standards for Summary Judgment

Summary judgment is properly granted only when the pleadings, depositions, answers to interrogatories, admissions

on file, and affidavits show that there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law. Fed.R .Civ.P. 56(c). The substantive law determines what facts are material to the determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In assessing the record before the court, the "non-movant will have his allegations taken as true," *Distasio v. Perkin Elmer Corporation*, 157 F.3d 55, 61 (2d Cir.1998), but he or she may not oppose summary judgment merely by offering conclusory allegations or denials. *See Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 (2d Cir.1997).

B. Standards for Age-Related Employment Discrimination[3]

1. Disparate Treatment

To make out a *prima facie* case of age discrimination under a theory of disparate treatment, the plaintiffs must show that they (1) are members of the protected age group, (2) are qualified for their jobs, (3) suffered an adverse employment action, and (4) that the action occurred under circumstances giving rise to an inference of discrimination. *Viola v. Philips Medical Systems of North America*, 42 F.3d 712, 716 (2d Cir.1994). To establish the fourth element of their *prima facie* case, the plaintiffs must show that they were treated differently than similarly situated employees. *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir.1997)

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[3] Age discrimination suits brought under the New York human rights statutes receive the same analysis as claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, or the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir.1997); *Tyler v. Bethlehem Steel Corporation*, 958 F.2d 1176, 1180 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Maniatas v. New York Hospital-Cornell Medical Center*,—F.Supp.2d—, No. 97 Civ. 6112, 1999 WL 553831, (S.D.N.Y. July 26, 1999).

(sex discrimination under Title VII); *Tunnell v. United Technologies Corporation,* 54 F.Supp.2d 136, 140 (D.Conn.1999) (age, sex, and race discrimination under Title VII and ADEA); *Richardson v. Newburgh Enlarged City School District,* 984 F.Supp. 735, 741 (S.D.N.Y.1997) (race discrimination under Title VII). If a *prima facie* case of discrimination has been shown, the burden then shifts to the defendant who must articulate a legitimate, non-discriminatory reason for the challenged conduct at issue. *Viola,* 42 F.3d at 716. The burden then shifts back to the plaintiffs, who must then establish that the employer's stated reason was a pretext for improper discrimination. *Id*

2. Disparate Impact

In order to state a *prima facie* case of age discrimination under a theory of disparate impact, the plaintiffs must show that they are members of a protected class and that the challenged employment practice had a significant disparate impact on that class. *District Council 37, AFSCME, AFL-CIO v. New York City Department of Parks and Recreation,* 113 F.3d 347, 351 (2d Cir.1997). A disparate impact is present where "a neutral practice falls more harshly on one group than another." *Lowe v. Commack Union Free School District,* 886 F.2d 1364, 1373 (2d Cir.1989) (internal citations and quotations omitted), *cert. denied,* 494 U.S. 1026 (1990). An employer may then show that the challenged practice had a legitimate purpose, after which the plaintiffs must prove that the proffered purpose is pretextual. *Id.*

C. Seniority Integration

With respect to their integration into Delta's then-existing seniority list, the plaintiffs' have failed to establish a *prima facie* case of disparate treatment. Although the plaintiffs have undoubtedly met their burden with respect to the first three prongs of the analysis, their claim fails on the fourth prong.

More specifically, Delta argues that since the plaintiffs were not similarly situated to the "regular" Delta pilots, the plaintiffs cannot show—as the following analogies demonstrate—that they were treated in such a way that gives rise to an inference of discrimination. I agree. Indeed, differences in treatment are probative only if the individuals used for comparison are similarly situated to the plaintiff "in all material respects." *Shumway,* 118 F.3d at 64; *Martinez v. United Technologies Corporation,* 50 F.Supp.2d 130, 133-34 (D.Conn.1999) (race discrimination under Title VII); *Cunliffe v. Sikorsky Aircraft Corporation,* 9 F.Supp.2d 125, 131 (D.Conn.1998) (sex discrimination under Title VII). One such factor includes the comparability of the two groups' "occupational status." *Richardson,* 984 F.Supp. at 746. With these standards in mind, and in conformity with the Court's prior decision on this score, I find that "[a]ny claim of [discrimination] must be based on a comparison of the Pan Am personnel whose rankings were affected by the challenged employment action." *Adams v. Delta Air Line, Inc.,* No. 96 Civ. 2871, 1997 WL 620823, (S.D.N.Y. Oct. 8, 1997) (finding that comparison between Pan Am and Delta personnel was "akin to comparing apples and oranges"), *aff'd,* 175 F.3d 1007 (2d Cir.1999), *cert. denied,*—S.Ct.—, 1999 WL 552851 (U.S. Oct. 4, 1999). Indeed, it is beyond peradventure that the two groups of pilots are not similarly situated since differences such as their airline of origin and the expected success of each airline at the time of the integration were "taken into account in creating ... a viable integration methodology." *Id.* (citing *Bovers v. Flying Tiger Line, Inc.,* 979 F.2d 291, 297-98 (2d Cir.1992)). Accordingly, the Court's analysis here will center on possible age-based discriminatory treatment, if any, endured by older Pan Am pilots *vis-a-vis* younger Pan Am pilots.

Plaintiffs have failed to show that they received less favorable treatment than similarly situated employees because of their age. Indeed, *all* the plaintiffs—whether 27 or 57 at the time of

their being hired—uniformly suffered a relative loss of seniority after the integration with Delta's then- existing seniority list. The plaintiffs have not shown—nor can they—that the Pan Am pilots were disadvantaged on the basis of their age. That being said, it becomes clear that the distinction here is not age, but rather the permissible criteria of airline of origin. *See Bovers v. Flying Tiger Line Inc.*, 979 F.2d 291, 297 (2d Cir.1992) (affirming summary judgment against plaintiffs of ADEA claim since allegedly discriminatory post-merger seniority system was motivated by the plaintiffs' airline of origin, not the plaintiffs' age); *Cook v. Pan American World Airways, Inc.*, 647 F.Supp. 816, 823 (S.D.N.Y.1986) (finding as *bona fide* a seniority system that was "reasonably designed to preserve pre-merger expectations" for each merging airline), *aff'd*, 817 F.2d 1030 (2d Cir.), *cert. denied*, 484 U.S. 913 (1987). For this reason, the plaintiffs' disparate treatment claim necessarily fails as a matter of law.

The plaintiffs make much of written comments made by Harry Alger, then Delta's Vice-President of Flight Operations alleged to have had authority to approve the seniority integration method for Delta. Alger's comments referred to Pan Am's "contaminated work force" and made several references to the Pan Am pilots' ages. (*See* Pls .' Rule 56.1 Statement ¶¶ 14-19.) These remarks and surrounding circumstances, however, fail to address the fact that the key distinction here and the basis for the slotting was the plaintiffs' airline of origin, not age. While it might be argued that such evidence would permit an inference of discrimination which would complete the plaintiffs' required showing for a *prima facie* case, the plaintiffs simply have not overcome the "similarly situated" requirement. The Second Circuit has recognized that differences in pilots' pre-merger airline and accompanying future expectations justifies treating differently two groups of employees in the integration of seniority rights. *See Bovers*, 979 F.2d at 297-98

(finding "age neutral" and thus permissible defendant airline's unequal treatment of new employees based on the latter's lower pre-merger employment prospects). Moreover, even crediting the plaintiffs' evidence on this score, a modicum of "unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age" has been held insufficient to withstand summary judgment in similar contexts. *See Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.) (affirming district court's granting of summary judgment in favor of defendant airline), *cert. denied*,—U.S.—,118 S.Ct. 626 (1997).

The plaintiffs' disparate impact claim meets a similar fate.[4] As indicated above, "[a]ny claim of disparate impact must be based on a comparison of the Pan Am personnel whose rankings were affected by [sic] challenged employment action." *Adams*, 1997 WL 620823 at *2. Indeed, the plaintiff cannot show a disparate impact based on age since *all* Pan Am pilots hired by Delta—whether age 27 or 57—encountered a loss of seniority as compared to what they had at Pan Am. Thus, any "negative" impact here was felt by both younger and older former Pan Am pilots and, as previously discussed, was based on the plaintiffs' airline of origin and not their ages.

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[4] With respect to the plaintiffs' three theories of disparate impact, I have serious questions whether, under the facts presented here, such claims can survive a threshold defect that emerges under current Second Circuit case law. The courts have held that a disparate impact theory of liability must allege a disparate impact on the *entire* protected group of employees and not simply one segment or "subgroup" of the protected class of employees. *See Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.1997) (dismissing ADEA claim where plaintiffs, all 55 years of age and older, acknowledged that the alleged adverse employment action had no negative impact on the overall group of pilots aged 40 and older, the group protected by statute), *cert. denied*,—U.S.—, 118 S.Ct. 626 (1997); *Lowe*, 886 F.2d at 1373 (rejecting the recognition of "sub-groups" in the disparate impact analysis). In *Lowe*, for example, the

Second Circuit rejected the notion that a disparate impact claim could be based on a policy that had a disparate impact on only one segment of a protected group and not other segments of the protected group. *Id.* at 1373. Under the statutes at issue here, all the plaintiffs in the case at bar are protected employees. *See* N.Y. Exec. Law § 296.3-a(a) (any individual "eighteen years or older"), and N.Y. City Admin Code § 8-107 (persons of all ages protected equally). Since the plaintiffs ranged in age between 27 and 59 at the time of the alleged discrimination, it is logically impossible in this case to argue that the entire protected group was disparately impacted on the basis of age. My conclusion here might well be different but for the broad range in ages of the plaintiffs in 1991.

D. Ten-Year Service Requirement

The plaintiffs allege that Delta discriminated against them on the basis of their ages by declining to waive the provision of the Delta Pilots Medical Benefit Plan that requires all employees to work for Delta for ten years before Delta will pay the entire cost of the employees' post-retirement medical insurance premiums. This provision, which became effective January 1, 1992, provided that the ten-year service requirement would not apply to any pilot who had reached the age of 50 on or before that date and who was on the Delta Seniority List as of August 27, 1991. Since the Pan Am pilots were integrated into the Seniority List on November 1, 1991, no Pan Am pilot qualified for this waiver.

The plaintiffs' disparate treatment claim on this score suffers from the same defect as does their claim based on the seniority integration. The disparate treatment that occurred was implemented according to the employees' airline of origin, not their ages.[5] Moreover, Delta pilots age 50 and

[5] The ten-year service requirement for post-retirement medical benefits applied to all Delta employees, not just pilots.

over on January 1, 1992 received the benefit of an exemption from this requirement, while younger Delta pilots and all Pan Am pilots are required to complete their 10 years with Delta. As the plaintiffs correctly point out, to most younger pilots—i.e. those under 50—the ten-year rule is virtually "meaningless" if their career path is to fly for Delta. Practically speaking then, issues only arise in this context for pilots age 50 and over. Since all pre-existing Delta pilots aged 50 and over on January 1, 1992 were exempted from the ten-year requirement, the only group of pilots that was treated "disparately" was the group of incoming Pan Am pilots over the age of 50. Adopting the comparison sought by the plaintiffs—in other words, comparing older Pan Am pilots to older Delta pilots—only highlights the fact that the crucial distinction here was not age, but rather airline of origin: 50-plus year old Delta pilots were treated differently—better—than similarly aged pilots coming from Pan Am. The plaintiffs themselves admit this fact by commentating that "[t]here can be no serious dispute that the Pan Am pilots were treated differently from every other Delta pilot when Delta made the decision about which benefits package to offer to them. . . ." (Pls.' Mem. Opp'n Summ. J. at 17.) This analysis makes clear that the ten-year service requirement inflicted neither disparate treatment based on age, nor did it cause any disparate impact on older employees.

E. Pay Increase

The plaintiffs also allege that Delta discriminated against them on the basis of their ages by offering them employment starting at their existing Pan Am pay rates with pay raises to Delta's higher level phased-in incrementally over three years. The defendants counter that there is no difference in treatment of similarly situated individuals here since all Pan Am pilots—*and every other former Pan Am employee hired by Delta*—regardless of age, was hired at his or her last Pan Am pay rates. The plaintiffs' claims here are without merit.

The fact that *every* former Pan Am employee hired by Delta was paid in such a way is conclusive evidence that Delta discriminated against the plaintiffs solely on the basis that they were former Pan Am employees. To echo this Court's earlier findings on this very issue, "the pay of all Pan Am hires was 'phased up' over a three-year period and plaintiffs have put forth no evidence to indicate this was anything other than an economic decision, or again, that it had any negative impact correlated with age." *Adams,* 1997 WL 620823 at *see also Criley,* 119 F.3d at 105 (citing *Hazen Paper Company v. Biggins,* 507 U.S. 604, 609 (1993), for the proposition that decisions motivated by economic concerns do not violate the ADEA).

III. CONCLUSION

For the foregoing reasons, the defendant's motion is GRANTED, and the plaintiffs' complaint is hereby DISMISSED. The Clerk of the Court is directed to close this case.

Supreme Court, U.S.
FILED
SEP 17 2001
OFFICE OF THE CLERK

No. 01-278

IN THE

Supreme Court of the United States

MARK ABDU-BRISSON, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DELTA AIR LINES, INC.

THOMAS C. FRENCH
LAW DEPARTMENT
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QUESTION PRESENTED

Did the Second Circuit Court of Appeals properly affirm the district court's summary judgment dismissing Petitioners' age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the New York Human Rights Law, N.Y. Exec. Law § 296 (McKinney's 1993), and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-107 *et seq.*, where the conduct complained of was: (1) the manner in which Petitioners, who are a group of pilots formerly employed by Pan American World Airways, Inc. ("Pan Am") that Delta hired, were placed on Delta's pilot bidding seniority list pursuant to an agreement between Delta and its pilots' union, and (2) Delta's decision to raise Petitioners, along with all other Pan Am employees hired by Delta regardless of their age, to Delta's pay rates over a three-year period and not to credit their Pan Am service toward their eligibility for certain post-retirement medical benefits at Delta; where the district court found no prima facie case of age discrimination; and where the court of appeals found a "de minimis" prima facie case but found no evidence that the legitimate nondiscriminatory reasons for the challenged conduct were pretextual.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Delta Air Lines, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, plaintiffs and appellants below, are 488 former Pan Am pilots (Captains and co-pilots) who were hired by Delta in 1991 in connection with Delta's purchase of certain Pan Am assets. Rather than placing Petitioners at the bottom of its pilots bidding seniority list upon their hiring, as Delta's then-existing collective bargaining agreement would have required, Delta negotiated an agreement with the union that represents Delta's pilots on a seniority integration methodology pursuant to which Petitioners were offered positions on the Delta pilots' seniority list that were slotted among those of existing Delta pilots. Delta also agreed to raise the pay of Petitioners, along with all Pan Am employees it hired, from their lower Pan Am rates to Delta's higher rates over a period of three years. Finally, Delta required Petitioners, like all other Pan Am employees it hired, to obtain ten years of service with Delta before becoming eligible for fully paid post-retirement medical benefits.

Although Petitioners accepted Delta's offers of employment and agreed to the bidding seniority positions made available pursuant to the agreement with Delta's existing pilots, three years later they filed this suit, claiming that Delta's failure to obtain for them more favorable pilot bidding seniority than it was able to negotiate with the pilots' union and failure to offer more favorable benefits constituted age discrimination in violation of New York State and New York City law. The district court granted summary judgment in favor of Delta, finding no prima facie case of age discrimination. The United States Court of Appeals for the Second Circuit affirmed this judgment, albeit on different grounds, finding a "de minimis" prima facie case but no evidence Delta's legitimate nondiscriminatory reasons for its conduct were pretextual. Petitioners now ask this Court to grant certiorari to review the lower courts' rulings on the issues of New York State and New York City law presented in this case.

This Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct, but also because no legal issue worthy of the Court's certiorari review is presented by the petition. As a threshold matter, the petition requests this Court to pass judgment solely on a matter of state and municipal law. Furthermore, Petitioners' arguments are based upon the erroneous and unsupported assertion that the court of appeals, in looking to federal law for guidance in interpreting New York City and State law, improperly analyzed only whether Petitioners could show pretext through evidence that Delta's nondiscriminatory rationales for its actions were false, rather than allowing Petitioners to prove pretext through other means as well. The Second Circuit, however, did no such thing. The Second Circuit properly examined both whether Petitioners could show falsity, as well as whether the handwritten notes of a Delta employee to which Petitioners pointed as evidence of pretext could establish that Delta's stated rationales were a cover up or, as the Second Circuit put it, a "ruse," for age discrimination. There thus is no conflict between the Second Circuit's application of New York City and State law in this case and the well established analysis followed by federal courts interpreting the burdens of proof under federal age discrimination law.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioners' "Statement of the Case" (Pet. 3-7) is incomplete, and the factual assertions in their petition are a significant distortion of the record evidence. A more complete statement of the undisputed facts relevant to the petition is set forth below.

A. The Asset Purchase Agreement Between Delta and Pan Am

In January 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement (the "APA"), pursuant to which Delta agreed to acquire certain equipment, route authority, and other assets from Pan Am. The APA was approved by the United States Bankruptcy Court for the Southern District of New York on August 12, 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (Bankr. S.D.N.Y. 1994).

The APA provided that Delta would hire at least 6,600 Pan Am employees, including 700 Pan Am cockpit personnel, the approximate number required to operate the aircraft that Delta had agreed to acquire. The APA obligated Pan Am to "provide to [Delta] a list of all employees in order of seniority and by . . . classification," and it required Delta to offer employment to the Pan Am pilots (Captains and First Officers) and flight engineers (Second Officers) "in seniority order by category." The APA also provided that Delta could not offer employment to Pan Am's pilots and flight engineers unless and until Delta had reached an agreement with existing Delta pilots on the terms and conditions of employment that Delta would offer, including the methodology for placing the Pan Am pilots and flight engineers on the Delta pilots' bidding seniority list.

B. Creating Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List

Absent an agreement with the existing Delta pilots to create positions for the Pan Am pilots and flight engineers

on the Delta pilots' seniority list, the collective bargaining agreement between Delta and the Delta pilots' union, the Air Line Pilots Association ("ALPA"), required that all of the Pan Am cockpit personnel hired by Delta be placed at the *bottom* of the pilot seniority list (like all new-hire pilots), *below all existing Delta pilots*. On August 30, 1991, Delta and ALPA agreed on a "modified status ratio methodology" that created slots for the Pan Am cockpit personnel on the Delta pilots' seniority list. The slots were spread throughout the Delta pilots' seniority list and generally corresponded to the cockpit jobs being created at Delta in connection with the asset acquisition. This methodology was set forth in a supplemental collective bargaining agreement between Delta and ALPA.

C. Delta's Hiring of Pan Am Pilots

Petitioners, and many other former Pan Am pilots, applied to Delta for employment as pilots (Captains and co-pilots). Delta offered Petitioners employment as pilots, along with positions (granted by the existing Delta pilots) on the Delta pilots' seniority list pursuant to the supplemental collective bargaining agreement that Delta had negotiated with ALPA. Each Petitioner accepted Delta's employment offer and began working for Delta as a pilot in the fall of 1991. Since Delta offered employment to the Pan Am pilots in their Pan Am seniority order, Delta hired a relatively senior group of pilots. The average age of the 690 Pan Am pilots (Captains and First Officers) hired by Delta was 50 (median age 52). However, their ages spanned from 27 to 59 (a federal regulation prohibits any person from occupying a Captain or First Officer position after the age of 60).[1]

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1. 14 C.F.R. § 121.383(c).

D. Petitioners' Claims in This Action

Petitioners, after having accepted Delta's offers of employment, sought through this action to force the original Delta pilots to give them more senior positions on the pilot bidding seniority list. Petitioners filed this action in New York state court on October 31, 1994, three years after the closing of the Pan Am Asset Purchase Agreement. Under the guise of an "age discrimination" theory, Petitioners sought to use New York State and New York City law to force an increase in their relative bidding seniority at the expense of the original Delta pilots.[2]

Petitioners do not complain about the order in which the slots created in the pilot seniority list were filled by Pan Am pilots. Since Delta offered Pan Am pilots placement in the newly created slots on the basis of their relative seniority on the Pan Am pilots' seniority list, older Pan Am pilots generally were favored by the manner in which the slots were filled. Thus, Petitioners are challenging only the creation of the slots themselves, claiming that the incumbent Delta pilots (who allegedly were, on average, younger) should have given up more of their contractually protected bidding seniority to the Pan Am pilots (who allegedly were, on average, older) than they did.

Petitioners also seek through this action increased pay and post-retirement medical insurance benefits from Delta. Most Pan Am employees, including Petitioners, were paid

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2. Petitioners initially filed suit in state court in New York, and Delta removed the case to federal court on the grounds that certain of Petitioners' claims were completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*

significantly less than Delta employees, including Delta pilots. Delta offered employment to Petitioners and other Pan Am employees at their Pan Am pay rates with scheduled increases to parity with Delta's higher pay rates spread out over a period of three years. Pilots were treated the same as all other Pan Am employees of all ages in this respect.

As for Petitioners' claims regarding medical benefits, before the Pan Am asset acquisition was even contemplated, Delta had adopted a requirement that those employees who retired with less than ten years of Delta service had to pay a portion of the premiums for their post-retirement medical insurance coverage. Delta adopted this requirement in an effort to restrain the spiraling growth in the costs of its post-retirement medical benefits. No exemption was made for the former Pan Am employees, nor could their service at Pan Am be counted toward the ten-year required Delta service. Thus, under the policy at issue in this case, all former Pan Am employees, regardless of age, had to work for Delta for ten years before the company would pay the full cost of their post-retirement medical insurance coverage.

II. PROCEDURAL BACKGROUND

A. The District Court's Decision[3]

The district court granted Delta's summary judgment motion and dismissed Petitioners' state-law claims on the

3. Prior to the district court's decision on the merits of Petitioners' claims, the affirmance of which by the Second Circuit is at issue here, the district court granted Delta's motion to dismiss based on the preemption of Petitioners' claims by the Airline (Cont'd)

grounds that Petitioners had failed to satisfy their burden to present evidence on each element of their prima facie case of age discrimination. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999). Specifically, the district court held that Petitioners were not "similarly situated" to the existing Delta pilots whose more favorable treatment on the Delta pilots' seniority lists Petitioners allege to be the result of age discrimination. *Id.* at *3-4. Thus, while Petitioners might have been treated less favorably because of their airline of origin, they failed to produce evidence sufficient to establish a prima facie case of discrimination in the creation of pilot bidding seniority slots for them. The district court rejected Petitioners' challenges to Delta's post-retirement medical benefits rules because Delta applied these same rules to all Pan Am employees it hired, regardless of their age, and thus the difference in treatment likewise was caused by Petitioners' airline of origin, and not by their age. *Id.* at *5. Similarly, the district court held that because Delta's three-year pay increase applied equally to former Pan Am employees of all ages, Petitioners could advance no age discrimination claims based on their pay. *Id.* at *5-6.

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Deregulation Act ("ADA"), 49 U.S.C. § 41713. *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996). The Second Circuit reversed the district court's ruling on ADA preemption, however, and remanded the case. *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2d Cir. 1997). On remand, the district court granted Delta's motion for summary judgment on the merits of Petitioners' claims. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999).

B. The Second Circuit's Decision

Petitioners appealed the district court's dismissal of their age discrimination claims to the United States Court of Appeals for the Second Circuit. Looking to federal law for guidance, the Second Circuit disagreed with the district court's evaluation of Petitioners' prima facie case, holding that Petitioners "produced enough evidence to meet their *de minimis* burden of raising an inference of discriminatory intent by Delta." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001). The court, however, also held that Delta had set forth legitimate, nondiscriminatory explanations for Petitioners' positions on the pilot bidding seniority list, and for its requirements regarding post-retirement medical benefits and pay increases. Specifically, the court acknowledged the undisputed evidence that Petitioners' positions on the seniority list were due to the fact that Delta had to negotiate for slots from the existing Delta pilots, and that the modified status ratio methodology that was agreed upon was both reasonable and was approved by the pilots' union, ALPA. As for post-retirement medical benefits and pay increase issues, Delta's decisions were undisputed to be motivated by its desire to contain the costs of the otherwise expensive Pan Am asset acquisition. *Id.* at 469.

Turning to Petitioners' obligation to demonstrate evidence that these asserted justifications were pretextual, the Second Circuit observed that, following this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), the inquiry under the ADEA remains whether Petitioners were able to "make a showing that [Delta's] proffered explanations were pretextual." *Abdu-Brisson*, 239 F.3d at 470. The court found that

Petitioners had advanced no evidence of pretext sufficient to withstand summary judgment, and thus affirmed the judgment in Delta's favor. *Id.* The court subsequently denied Petitioners' motion for rehearing and suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to determine whether the United States Court of Appeals for the Second Circuit correctly affirmed the district court's grant of summary judgment to Delta on Petitioner's age discrimination claims under a New York statute and the New York City administrative code. This case does not involve claims under the ADEA or another federal statute, however, and the Second Circuit's decision is entirely consistent with the New York courts' interpretation of the state statute and city code provisions at issue here. Thus, this is not an "exceptional case" that warrants this Court's review of a decision based solely on state law, and the petition for certiorari should be denied on these grounds alone.

Moreover, even if this Court were to consider the merits of the court of appeals' ruling on the state-law issue presented here, the petition should be denied. Petitioners' argument that the Second Circuit's analysis of federal law reveals a circuit conflict regarding whether a showing of pretext necessarily involves a showing of falsity, or whether pretext instead may be shown by other forms of evidence, is incorrect. The Second Circuit fully analyzed Petitioners' efforts to muster sufficient evidence of pretext to overcome summary judgment, considering both whether Delta's explanations were false as well as whether any evidence existed that otherwise demonstrated that Delta's proffered justifications were pretextual.

Petitioners presented no evidence that Delta's asserted justifications were false, however, and merely pointed to the same evidence that the Second Circuit found barely sufficient to meet the "de minimis" showing of a prima facie case of age discrimination as their evidence of pretext as well. The Second Circuit scrutinized Petitioners' evidence, but found it insufficient to demonstrate pretext because it failed to create an issue of fact that would allow a rational jury to find that Delta's articulated explanations were a "ruse" for age discrimination. Far from calling on this Court to resolve a purported circuit conflict, Petitioners actually ask the Court to interpret the requirements of New York State and City law differently than the Second Circuit did, and to reach a different conclusion than that court as to whether the evidence offered by Petitioners on the issue of pretext was sufficient for their claims to go to trial. Their request for certiorari review of the Second Circuit's decision accordingly should be denied.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SOLELY INVOLVES QUESTIONS OF STATE LAW, AND DOES NOT PRESENT AN "EXTRAORDINARY CASE" THAT WARRANTS THIS COURT'S REVIEW OF SUCH ISSUES.

Petitioners have not asserted any age discrimination claims against Delta under the federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"). Instead, as they concede, Petitioners have asserted age discrimination claims solely under New York State and City law. *See* New York State Human Rights Law, N.Y. Exec. Law § 296 (McKinney's 1993) ("State HRL");

New York City Human Rights Law, N.Y. City Admin Code §§ 8-107 *et seq.* ("City HRL"). *See* Pet. for Cert., at 5 n.3.[4]

This Court repeatedly has admonished that it will "not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996); *see also id.* at 146 ("It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon by a federal court of appeals.") (Stevens, J., dissenting); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case.").[5]

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4. Petitioners nonetheless assert that "the Second Circuit decided this case under federal law," apparently arguing this to be the case because the State HRL and City HRL generally look to federal law for guidance and follow the same burden of proof as the ADEA. *Id.* at 8 n.8. This is simply incorrect. The Second Circuit's decision was grounded in New York State and New York City law, as its own opinion recognized. *See Abdu-Brisson*, 239 F.3d at 465. Accordingly, if this Court were to grant certiorari in this case and decide the issues that Petitioners ask it to consider, this Court would be rendering a decision solely on matters of New York law — a decision that would be binding neither on federal courts applying federal discrimination statutes such as the ADEA, nor on New York courts applying the State HRL and City HRL, but only on federal courts interpreting New York State and City law.

5. The rarity of granting such petitions is underscored by this Court's 1980 deletion of a portion of its own rule that specifically

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This Court noted in *Leavitt* that the grant of a petition for certiorari "solely to review what purports to be an application of state law" is appropriate where "the alternative is allowing blatant federal court nullification of state law." *Leavitt*, 518 U.S. at 144-45. Here, however, there is no danger of such "blatant federal court nullification." The Second Circuit's holding that summary judgment was appropriate because Petitioners failed to offer any evidence that Delta's legitimate explanations for its actions were a pretext for age discrimination is entirely consistent with the New York courts' interpretation of the State HRL and the City HRL. The New York courts, like the Second Circuit, have analyzed the issue of pretext by looking to whether a plaintiff alleging discrimination can bring forth evidence that the employer's explanation was false. *See, e.g.*, *Ferrante v. Am. Lung Assoc.*, 687 N.E.2d 1308, 1311 (N.Y. 1997) (noting that discrimination plaintiff suing under State HRL may "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" by showing " 'that the reason was false' "); *Hardy v. Gen. Elec. Co.*, 705 N.Y.S.2d 97, 101 (N.Y. App. Div.) (same), *appeal denied*, 739 N.E.2d 295 (N.Y. 2000).

Thus, far from blatantly nullifying the State HRL and the City HRL, the Second Circuit's holding is consistent with the New York courts' prior interpretations of these laws.

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included as grounds for certiorari review a decision of " 'a court of appeals [that] has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law.' " *Leavitt*, 518 U.S. at 147 (comparing S. Ct. R. 19(1)(b) (1970) with S. Ct. R. 17.1 (1980)) (Stevens, J., dissenting). In this Court's current rules, this specific basis for certiorari review remains absent. *See* S. Ct. R. 10.

Accordingly, this is not the "extraordinary case" that warrants this Court's exceedingly rare invocation of certiorari jurisdiction to review a court of appeals' decision on solely a state-law matter.

II. THE SECOND CIRCUIT FULLY AND APPROPRIATELY ANALYZED PETITIONERS' ARGUMENTS REGARDING PRETEXT.

Even if this Court were inclined to address the appropriate standard to be used in analyzing evidence of pretext in age discrimination claims asserted under New York law, certiorari should be denied because the question that Petitioners claim is presented for review is not actually presented in the petition. The issue that Petitioners claim is presented here is merely one of semantics — whether the Second Circuit's use of the word "false" several times in its opinion means that the court operated on the premise that pretext always requires a showing of falsity. In other words, did the Second Circuit believe that evidence of falsity is coextensive with evidence of pretext, or did the court view it instead merely as a subset of evidence that can be used to prove pretext?

Petitioners contend that the former is true, and that the court of appeals failed to consider other ways in which they claim they could have established that Delta's asserted justifications for its actions were a pretext for age discrimination. When the opinion below is reviewed in full, however, it is clear that the Second Circuit actually followed the latter view, and considered all of the evidence that Petitioners offered — including the evidence they claim was ignored — irrespective of the terminology that the court employed in its opinion.

A. The *McDonnell Douglas* Burden-Shifting Framework.

Petitioners' argument rests on the last prong of the three-part burden-shifting method of proof in discrimination cases that this Court first adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, in which the plaintiff seeks to establish his or her case solely through circumstantial evidence of discrimination.[6]

First, the plaintiff must establish a prima facie case of discrimination. *See Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). After the prima facie case is made, the burden shifts to the defendant to "set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). "This burden is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 509).

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6. In contrast to cases involving circumstantial evidence such as this one, another way to prove discrimination is through the use of direct evidence of discrimination. Direct evidence is evidence which, if believed, would prove without inference or presumption that the affected employees were discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990). There is no direct evidence that any of the challenged conduct in this case is the result of age discrimination. Accordingly, this case solely involves alleged circumstantial evidence of discrimination.

Once this burden is met, " 'the *McDonnell Douglas* framework — with its presumptions and burdens' — disappear[s], . . . and the sole remaining issue [i]s 'discrimination *vel non*.' " *Id.* at 142-43 (citations omitted). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. To satisfy this burden, the plaintiff may "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 248. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.' " *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 256).

B. The Second Circuit Properly Considered Whether Petitioners Could Introduce Evidence That Delta's Asserted Nondiscriminatory Reasons for its Actions Were False in Determining Whether Petitioners Could Avoid Summary Judgment on the Issue of Pretext.

That the Second Circuit inquired as to whether Petitioners could demonstrate that Delta's explanations for its actions were false is not, by itself, inappropriate. This Court's own decisions in the Title VII and ADEA arenas recognize that a showing of falsity often is a persuasive way to demonstrate pretext. *See St. Mary's Honor Ctr.*, 509 U.S. at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."); *see also Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of

circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Moreover, as Petitioners concede, this Court frequently has used the words "false" or "falsity" in discussing a discrimination plaintiff's obligation to produce sufficient evidence of pretext to survive summary judgment. For example, in *Reeves*, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is *false*, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added). *See also id.* at 144 (analyzing petitioner's evidence of pretext, and stating that "Petitioner, however, made a substantial showing that respondent's explanation was false") and 147 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); *St. Mary's Honor Ctr.*, 509 U.S. at 515 ("But a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.") (emphasis omitted).

Thus, this Court expressly has recognized that evidence of the falsity of the employer's reason for its actions is relevant to show pretext, and the Second Circuit therefore did not err in measuring Petitioners' evidence against this standard. Nor did the Second Circuit err in finding that Petitioners lacked any evidence that Delta's proffered explanations were false. Nothing in the record before that court, or the district court, undermined the validity of Delta's justifications that it integrated Petitioners into the pilot bidding seniority list in the fashion it did because ALPA was willing to agree to these slots, or that it imposed the

rules concerning post-retirement medical benefits and pay increases at issue here to minimize the costs of the acquisition of Pan Am assets. The Second Circuit's consideration of Petitioners' inability to produce any evidence of the falsity of Delta's nondiscriminatory reasons for its actions therefore was proper.

C. The Second Circuit Also Properly Considered Whether, Even if Delta's Asserted Explanations Were True, Petitioners Nonetheless Could Establish Evidence of Pretext Through Some Other Means.

The linchpin of Petitioners' argument is the assumption that the Second Circuit considered *only* whether they could introduce evidence that Delta's explanations for the employment actions at issue were factually false, *i.e.*, that ALPA would have agreed to greater seniority for the former Pan Am pilots, or that providing greater post-retirement medical benefits and increased pay sooner was not based on the costs of these measures. As noted above, the Second Circuit did analyze these matters, and properly found evidence of falsity to be lacking. *Abdu-Brisson*, 239 F.3d at 470. But that is not all it considered.

The Second Circuit also discussed whether Delta's asserted justifications, even if factually true, were nonetheless not the real reason for its actions, with the real reason being age discrimination. For example, the court noted that, once an employer has met its burden of production by asserting nondiscriminatory reasons for its actions, "the burden shifts back to the plaintiff to come forward with evidence that the employer's proffered explanations were merely pretextual and that the actual motivations more likely than not were discriminatory." *Id.* at 469. The Second Circuit

also observed that "*Reeves* in no way relaxed the requirement that plaintiffs make a showing that the defendant's proffered explanations were pretextual." *Id.* at 470. Thus, the court properly recognized that the ultimate issue was whether Petitioners could demonstrate evidence of pretext, such that the trier of fact could reasonably conclude that Delta's true motivation was age discrimination.

One way to demonstrate pretext, consistent with *Reeves*, would be through evidence of falsity, *i.e.*, evidence that Delta's asserted reasons for its actions were factually wrong. Correctly finding that Petitioners lacked any such evidence, the Second Circuit turned to the purported evidence of pretext offered by Petitioners — the handwritten notes of Captain Harry C. Alger, Delta's then-Vice President of Flight Operations — which, the court aptly observed, "are not only the centerpiece, but the entirety of [Petitioners'] case." *Id.* at 470. The court held, however, that these notes "are not sufficient to establish that Delta's stated financial rationale was a ruse" for age discrimination. *Id.* In other words, the court held that Captain Alger's notes were insufficient to create a genuine issue of material fact as to whether Delta's asserted explanations for its pay and benefits decisions, even if factually true, nonetheless were a cover-up (or a "ruse") for its true motivation of age discrimination.

The court thus considered, and rejected, the very evidence that Petitioners claim it ignored. In their petition to this Court, Petitioners point only to Captain Alger's notes in support of their contention that they could have established pretext without undermining the factual correctness of Delta's reasons for its actions. *See* Pet. for Cert., at 14 ("Plaintiffs in this case presented clear evidence that the adverse employment actions were motivated by Delta's intent

to discriminate against them because of their age. Included in that evidence were derogatory comments made by Delta management about plaintiffs' ages."). The Second Circuit considered this evidence, but held that it fails to establish any inference of discrimination in this case, just as it had held in past cases brought by former Pan Am employees against Delta.

Specifically, Captain Alger's notes were found by the United States Court of Appeals for the Second Circuit to be inadequate to defeat summary judgment in *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam), which was an age discrimination claim filed by a purported class of Pan Am pilots who were 55 years of age and older and were *not* hired by Delta in connection with the 1991 asset acquisition. Those same notes, moreover, were also found to be inadequate to defeat summary judgment in *Adams v. Delta Air Lines, Inc.*, No. 96-CIV-2871(HB), 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997), *aff'd*, 175 F.3d 1007 (2d Cir.), *cert. denied*, 528 U.S. 877 (1999), which was an age discrimination claim filed by 71 former Pan Am flight engineers who challenged where they were placed on the Delta pilots' seniority list, which was *below* all of the Pan Am pilots (Captains and co-pilots) on the Delta list.

Petitioners' exclusive reliance on these notes in an attempt to show age discrimination makes even less sense in this case. The notes had nothing to do with the bidding seniority positions granted by the existing Delta pilots. All Petitioners were hired by Delta, and the seniority placement itself actually favored older Pan Am pilots over younger Pan Am pilots since the Delta pilot seniority slots were filled by the Pan Am pilots in their Pan Am seniority order. Furthermore, there was no evidence presented in this case

that Captain Alger had any involvement in Delta's decisions to require Petitioners, and all other Pan Am employees it hired, to obtain ten years of service before becoming eligible for fully-funded post-retirement medical benefits, or to wait three years before their pay would be raised fully from the lower Pan Am rates to the higher Delta rates. Instead, Captain Alger's notes reflect nothing more than stray remarks from a preliminary fact-finding investigation regarding the Pan Am workforce, after which a deal was struck in a way favorable to the oldest of the Pan Am pilots, whose ranks include Petitioners. By holding that these notes failed to raise any inference of pretext sufficient to overcome summary judgment, the Second Circuit properly acknowledged these realities.

Therefore, the issue that the petition claims is presented for this Court's review is not actually presented in this case. What Petitioners really ask this Court to do is to reweigh the evidence in the record and reach a contrary conclusion from that of the Second Circuit as to the effect of Captain Alger's notes on their ability to have their claims submitted to a jury on the issue of pretext. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). It accordingly should decline Petitioner's invitation to conduct such a review in this case.

D. This Court Should Not Grant the Petition Because the Judgment in This Case Also Can Be Affirmed Based on the Trial Court's Opinion.

Another reason counseling against this Court's acceptance of certiorari review in this case is that the judgment also can be affirmed based on the rationale of the

district court. Specifically, the district court held that Petitioners had not set forth evidence of a prima facie case of age discrimination with regard to their placement on the Delta pilots bidding seniority list because there was no evidence any difference in treatment was caused by their age rather than by their airline of origin. *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 CIV. 8494(HB), 1999 WL 944505, at *4 (S.D.N.Y. Oct. 19, 1999). Similarly, because it is undisputed that the restrictions regarding pay increases and post-retirement medical benefits at issue here applied equally to all Pan Am employees that Delta hired, regardless of their ages or pilot status, Petitioners could not show that Delta's imposition of these restrictions on them could be caused by age discrimination. *Id.* at *5-6.

As the district court's opinion confirms, this case involves differences in treatment of individuals who are not similarly situated and fails to present evidence sufficient to establish a prima facie case. Because the judgment in Delta's favor in this case thus could be affirmed based either on the district court's or the court of appeals' opinions, this Court ought not to grant certiorari to review the court of appeals' decision.

E. There Is No Circuit Conflict That Warrants This Court's Intervention.

Petitioners attempt to concoct a purported circuit conflict between the Second Circuit's opinion in this case and the opinion of the United States Court of Appeals for the Seventh Circuit in *Golomb v. Prudential Ins. Co. of Am.*, 688 F.2d 547 (7th Cir. 1982). There is no actual conflict with *Golomb*, however, because the Second Circuit considered not only whether Petitioners had set forth evidence of falsity, but also

whether they had offered any evidence that Delta's asserted justifications, even if factually true, were a cover up for its true motivation of age discrimination and thus sufficient evidence of pretext to overcome summary judgment.

In *Golomb*, which arose under the ADEA (in contrast to Petitioners' state-law claims), the plaintiff Golomb lost a jury trial, and appealed from the denial of his motion for a new trial. The basis for Golomb's appeal was the trial court's use of the word "pretext" in the jury instructions, which Golomb contended misstated his burden of proof because he believed the jury would assume that the word "pretext" means "false." The Seventh Circuit agreed with Golomb that "a claimant in an age discrimination suit need not prove that the employer's articulated reason was false," and need only show that "age was . . . a determining factor in the employer's decision." *Id.* at 551. The court, however, rejected Golomb's argument that "pretext" would mean "false" to the average juror based on the dictionary definition of this term, and upheld the trial court's jury instructions. *Id.* at 552.

Golomb thus stands only for the unremarkable proposition that evidence of falsity is not necessarily the only way to demonstrate pretext. The Second Circuit applied this same standard in this case, searching the record for evidence that Delta's asserted justifications were false and, finding none, also hunting for evidence that Delta's asserted explanations, even if factually true, were only a cover up — or, in the Second Circuit's words, a "ruse" — for its true motivation of age discrimination. *Abdu-Brisson*, 239 F.3d at 470. The only evidence that Petitioners offered on this point (or any other) was Captain Alger's notes, which the Second Circuit found insufficient to create a genuine issue of material fact as to pretext.

Thus, the Second Circuit's opinion in this case is entirely consistent with the Seventh Circuit's opinion in *Golomb*. Both cases recognize that, while evidence of the falsity of an employer's explanation can constitute evidence of pretext, falsity is not necessarily the only way to demonstrate pretext. There accordingly is no circuit conflict that would justify this Court's grant of the petition for certiorari in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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